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REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE

FOR THE

EASTERN DIVISION,
September Term, 1900.

MIDDLE DIVISION,
December Term, 1900.

WESTERN DIVISION,
April Term, 1901;

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

Vol. 106 Term.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

• FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1900.

TURNER v. LUMBER Co.

(Knoxville. October 20, 1900.)

1. CORPORATIONS. Authority to execute mortgage sufficient, when.

Authority for the execution of a mortgage by a manufacturing corporation, to secure a loan of \$1,000, sufficiently appears from a recital in the mortgage itself of the substance of the action taken by the stockholders and directors in these words, to wit: "Whereas, at a meeting of the stockholders and directors of said company, held in Kingston, Tenn., on April 5, 1892, a resolution was passed to borrow \$1,000 to operate said mill, which Mary L. Byrd agreed to loan upon six months' time, as here secured, which loan was accepted, and said money advanced." (Post, pp. 3, 4.)

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2. SAME. *Mortgage of, valid without seal.*

The impression of a corporate seal upon a mortgage or other instrument made by a domestic corporation, chartered and organized under the general incorporation Act of 1875, is not essential to its validity when the corporation has no common seal, and, in the absence of proof to the contrary, the Court presumes that the company had no common seal. (*Post*, pp. 4, 5.)

Act construed: Acts 1875, Chapter 142.

Code construed: § 2054 (S.); § 1704 (M. & V.).

Case cited: *Garrett v. Belmont Land Co.*, 94 Tenn., 473.

3. SAME. *Mortgage sufficiently signed by company.*

The mortgage of a corporation which commences, "We, the Kingston Lumber & Mfg. Co., has this day bargained and sold and do hereby transfer and convey," etc., and is signed, "Mary L. Byrd, President of the Kingston Lumber & Mfg. Co.," is sufficiently signed by the corporation to bind it. (*Post*, pp. 5, 6.)

Code construed: § 3679 (S.); § 2819 (M. & V.); § 2012 (T. & S.).

Case overruled: *Garrett v. Belmont Land Co.*, 94 Tenn., 473.

 FROM ROANE.

Appeal from Chancery Court of Roane County.
GEO. W. HENDERSON, Sp. Ch.

WASHBURN, PICKLE & TURNER and C. T. CATES,
JR., for Turner.

R. M. JONES and GEO. L. BURKE for Lum-
ber Co.

WILKES, J. The bill in this case is a general creditor's bill, filed to wind up the defendant com-

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pany as an insolvent domestic corporation. It was sustained as a general creditors' bill, and such steps were taken as that the property of the corporation was sold under the orders of the Court, and the proceeds are in the hands of a receiver or trustee, to be distributed as the Court may direct. Childress, Martin and DeArmond are creditors who had executions levied on certain personal property, consisting of machinery belonging to the corporation before the bill in this case was filed. The case comes to this Court upon the appeal of these three creditors, and the only question made by them is as to the validity and priority of a mortgage or trust deed on the property to secure a debt of \$1,000 to Mrs. Mary L. Byrd, executed before they made their levies.

The proceeds of sale will all be consumed in the satisfaction of this mortgage debt to Mrs. Byrd under the decree of the Chancellor and Court of Chancery Appeals.

The error assigned in this Court is this: It is said that the trust deed does not show that it was executed by the authority of the stockholders and directors of the corporation. The recital in the trust deed is as follows:

"Whereas, at a meeting of the stockholders and directors of said company held in Kingston, Tenn., on April 5, 1892, a resolution was passed to borrow \$1,000 to operate said mill, which Mary L. Byrd agreed to loan upon six months' time, as

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here secured, which loan was accepted and said money advanced, etc.”

It will be seen that this recital does not purport to be a copy from the minutes, but only to give the substance and effect of the entry.

It does state that Mrs. Byrd agreed to loan the money as here secured, which loan was accepted and said money advanced. This, we think, is a sufficient recital to show that the action of the meeting and the minute entry authorized the borrowing of the money, and the execution of a trust deed such as was then being prepared and executed.

It is objected, however, that the deed of trust, even if authorized, was not properly executed, signed, sealed and acknowledged.

The corporation is created and organized under the Acts of 1875 and subsequent amendments as a domestic corporation. It nowhere appears that it has ever adopted or used a corporate seal. In the absence of such fact, it is not necessary that the instrument should appear to have a seal impressed upon it.

Shannon, § 2054 provides that a corporation organized under the Act of 1875 may have and use a common seal, which it may alter at pleasure. If it have no common seal, then the signature of the name of the corporation by any duly authorized officer shall be legal and binding.

In the absence of a seal attached to such an

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instrument, when executed by a corporation created under this Act, the Court will presume that the corporation had no seal, and its impression upon the instrument is not necessary to the validity of the instrument, as would be the case with other corporations not organized under that Act. *Garrett v. Belmont Land Co.*, 10 Pickle, 459.

But it is said that it does not purport to be executed by the corporation nor any one for it, and is signed Mary L. Byrd, president of the Kingston Lumber & Mfg. Co. It is insisted that, so signed, it is the act and deed of Mary L. Byrd, and not of the corporation, and the words, "President of the Kingston Lumber & Mfg. Co.," are merely words of description.

Authority for this contention is found in the case of *Garrett v. Belmont Land Co.*, 10 Pickle, 473. In that case the deed was signed in the same manner as the deed of trust in this case, that is, "James McLaughlin, President of Second National Bank."

It was held in that case that the deed was not properly signed, and the Court referred to and commented upon § 2819 of Milliken & Vertrees' compilation in support of the holding. But the attention of the Court and counsel in that case was not called to the fact that this section 2819 of Milliken & Vertrees' compilation was inaccurately brought forward from the Code of 1858 and the Act of 1841-2, where it originated. In

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Shannon's compilation, § 3679, the Act is properly brought forward from the Code, and the defect in § 2819 of Milliken & Vertrees is corrected, and the section correctly reads:

"Instruments in relation to real or personal property executed by an agent or attorney, may be signed by such agent or attorney for his principal or by writing the name of the principal by him as agent or attorney, or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed." Milliken & Ventrees' compilation, § 2819, omitted the words, "his own name."

Now, tested by this statute, we find that this instrument on its face does show the character in which it is intended to be executed.

The deed says: "We, the Kingston Lumber & Mfg. Co., has this day bargained and sold, and do hereby transfer and convey," etc. It purports, as before stated, to be made in pursuance of authority from the company, and, again, the surplus after satisfying the secured debt is to be paid to the company. The certificate, while informal, is sufficient, we think, to show the character in which the deed of trust was executed and acknowledged.

This disposes of the only assignment of error made in this Court, and it results that the decree of the Court of Chancery Appeals must be affirmed.

Moses, Exr., v. Grainger.

MOSES, EXR., v. GRAINGER.

(*Knoxville*. October 20, 1900.)

1. **BILLS AND NOTES.** *Sale of collaterals by indorsee.*

The holder by indorsement of a note payable to a person named, or order, may execute a power of attorney therein contained authorizing sale of collaterals upon the maker's default in making payment. (*Post*, pp. 8-10.)

2. **COLLATERAL SECURITIES.** *Sale of.*

In the absence of express authority, the pledgee has no right to sell or dispose of collateral securities, such as bills and notes, upon default in the payment of the original debt. (*Post*, p. 11.)

3. **SAME.** *Same.*

A pledgee, who has express authority to sell collaterals, must exercise that power with fairness and due consideration for the rights of the pledgor. Hence, the sale of collaterals after the original debt had been due for nearly four years, and nearly all paid, without other than a general public notice which gave no information to the pledgor, is void, and confers no title upon the purchaser. (*Post*, pp. 10, 11.)

4. **APPEAL.** *Brings up whole case or nothing, when.*

An appeal from a decree settling a single and indivisible controversy, however worded, must be treated as bringing up the entire case, or be dismissed as bringing up no part of it, as the Court may elect. (*Post*, pp. 11-13.)

Case cited: *Williams v. Burg*, 9 Lea, 456.

FROM KNOX.

Appeal from Chancery Court of Knox County.
GEO. W. HENDERSON, Special Ch.

Moses, Exr., v. Grairger.

GREEN & SHIELDS for Moses.

CHAS. T. CATES, JR., for Jarnagin.

BEARD, J. On the 11th of May, 1895, Frank A. Moses executed to the Central Savings Bank of Knoxville his promissory note for \$301.10, payable ninety days after date "to the order of the payee," and pledged as collateral to secure it the note which is the subject of controversy in this case. The pledge of the collateral, as stipulated in the original paper, is in these words: "Having deposited with said bank as collateral security for the payment of this note, with authority to sell the same at public or private sale on the non-performance of this promise, and without notice, one note for \$500, signed by F. A. Moses and indorsed by Charles H. Moses, Henry L. Moses, and Mary P. Moses." The \$500 note thus pledged was dated 10th December, 1892, and matured six months after date.

Long after maturity of the original note, to-wit: in February, 1899, and after, by various payments made upon it by its maker, there was left due on it, in principal and interest, only \$86.50, the Central Savings Bank passed into the hands of a receiver, who sold a considerable part of its assets, including this note, to Galbraith & Maloney, of Knoxville. With this note was also delivered to them the collateral in question. Having received these assets, on the 7th of March,

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1899, these transferees posted the following notice: "On Thursday, March 9, 1899, at 11 o'clock A.M., we will sell to the highest bidder, for cash, in front of the courthouse door in Knoxville, certain collaterals attached to various notes assigned to us by the Central Savings Bank, which collaterals will be produced at the sale. This March 7, 1899. (Signed), Galbraith & Maloney."

Pursuant to this notice and without any demand upon the maker of the original note, these parties undertook to sell the collateral in question, when S. C. Jarnagin, having bid for it the sum of \$87.50, it was delivered to him as the purchaser. Thereupon, claiming to be its owner under this purchase, he filed his petition in this cause, instituted to wind up the estate of Mary P. Moses, now deceased, one of the indorsers of this collateral, asking that he be given a decree for the face value of the note and interest upon it. The Chancellor allowed a decree for the sum of \$87.50, the amount paid by him. From this decree he prayed an appeal, and the Court of Chancery Appeals reversed the Chancellor and dismissed his petition. From the finding of this latter Court he has appealed.

For the purpose of this case it may be conceded that the power of sale given in this contract of pledge was not a personal trust to be exercised by the payee alone, but under the terms "to the order of" would pass to an assignee as

Moses, Exr., v. Grainger.

in a mortgage, where the authority is given to the mortgagee or "assigns" (2 Pingrey on Mortgages, sec. 1320), but this concession will not avail the petitioner, Jarnagin. For there is an objection, we think, fatal to this claim. As has been seen, the original note was nearly four years past maturity at the time of this attempted sale. The first holder had, from time to time, accepted payments upon it until there was only fifty dollars of the principal due upon it. No demand was made upon its maker by Galbraith & Maloney to pay it and redeem the collateral, nor was any notice of the purpose to sell given him, the only notice being the one hereinbefore set out.

By the terms of the pledge the bank was vested "with authority to sell the same (the collateral) at public or private sale on the nonperformance of this promise [that is, the promise to pay "ninety days after date"] without notice." But is there any law which would regard a sale made by the bank under the conditions mentioned as a proper exercise of this authority? The acceptance of payments from the maker of the original note at different times after maturity and the indulgence given to him for near four years necessarily lulled him into a sense of security. He had a right to suppose that, under these circumstances, and after his note had been reduced to a trifling balance, that before exercising the right to sell, that a demand would be made upon

Moses, Exr., v. Grainger.

him to redeem his collateral. The general rule is, in the absence of express authority the pledgee has no right to dispose of collateral securities such as bills and notes upon default in the payment of the original debt. *Juliet Iron Co. v. Sciots, etc., Co.*, 82 Ill., 548 (S. C., 20 S. R., 347); *Morris Canal Co. v. Lewis*, 12 N. J. E., 321; *Stevens v. Wiley*, 165 Mass., 402. It is otherwise, however, when the authority to sell is given by the contract of pledge. But "such a power, so far as it enables the pledgee to extinguish the right of the pledgor to redeem, will, as other contracts affecting equities of redemption, be construed favorably for the interests of the pledgor so far as is consistent with the rights of the pledgee. The power of sale must be exercised with a view to the interest of the pledgor as well as of the pledgee, and the sale must not be forced for barely enough money to secure the payment of the debt." Colbrook on Collateral Securities, sec. 118.

We think the sale complained of was in disregard of these equitable principles, and if it had been made at the instance of the original holder, would not have been tolerated by a Court of conscience; no more favor will be shown to it when made by Galbraith & Maloney under a notice which gave no information to the pledgor.

But it is said that at least the Court of Chancery Appeals was in error in reversing that part of the Chancellor's decree which gave the

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petitioner, Jarnagin, a recovery of \$87.50, as the complainant did not appeal, and petitioner only appealed from it in so far as it limited his recovery to that sum.

We take it, the purpose of the petitioner was to limit his appeal so that whatever might be the ultimate result of his contention, he would at least save the sum so decreed. But we do not think he did this. The wording of the decree on this point is as follows: "From the foregoing decree so limiting his recovery the said S. C. Jarnagin prays an appeal," etc. As we construe it, this is an appeal that brings up the whole case. But if in error in this, it cannot avail appellant. The controversy is as to his ownership of this note. He claims the whole of it, and is entitled to the whole or no part of it. His appeal necessarily involves the whole case—that is, his title to the note as an entirety. He cannot shape his contention in this Court so as to eliminate this question. He cannot bring up one part of a single controversy, but in appealing opens up the whole field. If this was not so, the Court of Chancery Appeals would have been placed in the incongruous position of holding that the petitioner acquired nothing by the purchase of the notes, and yet affirming the decree giving a part of it. It would be otherwise if there had been several subjects of litigation settled by decree in the Court below. One appeal limited to one

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of these subjects would leave the decree operative as to the remainder.

But even if the appeal was limited, it was the duty of the Court of Chancery Appeals, as was said in *Williams v. Burg*, 9 Lea, 456, "to dismiss this special appeal as improperly granted, or treat it as bringing up the entire case." That Court adopted the latter alternative, and their decree reversing the decree of the Chancellor and dismissing the petition of Jarnagin, is affirmed.

Condon v. Galbraith.

CONDON v. GALBRAITH.

(Knoxville. October 20, 1900.)

1. **TAX TITLES.** *Purchaser of land sold for taxes acquires no title, when.*

A purchaser from the State, through the Circuit Court Clerk, of lands sold by the County Trustee, under Acts 1897, Ch. 1, for taxes of 1896, and not redeemed by the owner, acquires no title under his deed from the Clerk, where the trustee has failed to certify the list filed with the Clerk, showing the properties bid in at such tax sale for the State. (*Post*, pp. 15-20.)

Act construed: Acts 1897, Ch. 1.

Case cite: *Tax Title Cases*, 105 Tenn., 245.

2. **SAME.** *Authentication of list by Trustee.*

Where a correct list of properties bid in by the State at a tax sale, made under Acts 1897, Ch. 1, has been filed with the Circuit Court Clerk in due time, but left uncertified by oversight of the Trustee, the latter officer cannot, after the date for filing same has passed, and deed has been made by the Clerk, certify such list, so that the authentication will relate back to the date of its filing, and save the Clerk's deed from invalidity. (*Post*, pp. 20-27.)

Act construed: Acts 1897, Chapter 1.

3. **SAME.** *Decree of Circuit Court in confirmation of tax sale void, when.*

The Circuit Court is without jurisdiction to enter decree, as provided by Acts 1899, Ch. 435, confirming titles of purchasers at tax sales, made under Acts 1897 and 1899, and awarding writs of possession to purchasers, unless the required list, duly certified, of properties bid in for the State has been filed by the Trustee in due time with the Clerk of the Circuit Court. This certified list constitutes a jurisdictional fact. (*Post*, pp. 20-27.)

Acts construed: Acts 1897, Chapter 1; Acts 1899, Chapter 435.

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4. SAME. *Same.*

And such decree cannot be entered upon sales under Acts 1897, Ch. 1, without giving notice to the party whose land has been sold for taxes. (*Post*, pp. 24-27.)

Act construed: Acts 1899, Chapter 435.

FROM KNOX.

Appeal from Chancery Court of Knox County.
GEO. W. HENDERSON, Sp. Ch.

WEBB & McCLUNG for Condon.

SANSOM, WEICKER & PARKER and PICKLE &
TURNER for Galbraith.

WILKES, J. This is a bill to set aside a tax title to a tract of 346 acres of land in the Fourteenth Civil District of Knox County, near the city of Knoxville. The title rests upon a sale for taxes assessed for the year 1896, and was made under the provisions of the revenue act of 1897, and supplementary proceedings were had under the Act of 1899. Many objections are made to the validity of the tax title. The Chancellor gave the complainants the relief sought, declared the tax proceedings and deed a cloud upon the title of complainant to the land, and removed the same, and perpetually enjoined defendants from

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claiming it under the tax deed made to them by the Circuit Court Clerk. On appeal, this decree has been affirmed by the Court of Chancery Appeals, and both parties have appealed to this Court. It appears that when these taxes accrued, to-wit, the 10th of January, 1896, S. P. Condon owned the land in controversy, and it was assessed for taxes for that year to him. In September, 1896, he sold it to his brother, the complainant, Martin J. Condon, for about \$14,000.

This land, with that of other tax delinquents, was advertised for sale by the County Trustee, under the Act of 1897, and was sold September 9, 1897, and bought in by the Trustee in the name of the Treasurer for the State of Tennessee, for the use of the State of Tennessee, there being no other bidders. After making the sale, the Trustee, before the first Monday of October, 1897, filed in the office of the Clerk of the Circuit Court of Knox County a list of the lands so struck off by him in the name of the Treasurer, specifying the date of sale, the amount of taxes for which the respective sales were made, and each item of cost, the whole being in book form. The list was made out as the statute prescribes, except that the Trustee failed to make the certificate required by it.

On the 11th of September, 1899, defendant, Galbraith, paid to the Clerk of the Circuit Court all taxes, penalties, and costs for which the land

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in controversy in this cause had been sold on the 9th of September, 1897, and all taxes subsequently accruing except those of 1899, and demanded a tax title deed to the property. This was early on the morning of the 11th of September. The Clerk had just reached his office, and there being other parties present to attend to similar business, he said he could not then make the deed, but would do so later in the day. He did make the deed during the day, and in the meantime marked opposite the entry as to this tract of land the fact that it had been sold to Galbraith.

Galbraith took the deed to the office of the County Court Clerk to have it entered as the statute requires, and was informed by the Clerk that he did not have the proper book, and he was requested to hold the deed until he could procure a book, which he did, and on September 16, when the book had been procured, the entry was made.

Soon after Galbraith had paid the amount to the Circuit Court Clerk, S. P. Condon, the party in whose name the land had been assessed, tendered to that clerk the full amount of taxes, penalties, costs, etc., against the land and demanded a deed in the name of M. J. Condon, his vendee. The Clerk told him the land had been sold to Galbraith, and refused to receive the money. S. P. Condon then went to the Trustee's office and paid the taxes on the land

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for 1898; and on the next day went to the office of the Circuit Court Clerk and asked to be allowed to pay the taxes for 1896 and 1897, but this was refused. After consultation with his attorney, the Clerk did receive from Condon the taxes, penalties, interest and costs for 1897. So that when Condon paid the taxes for 1897 and 1898 the Circuit Court Clerk had in his hands the money paid by Galbraith for the taxes of 1896, 1897, and 1898.

The Court of Chancery Appeals reports that S. P. Condon had personal property sufficient to pay the taxes when this land was sold, and that neither the Trustee or other officer authorized to collect taxes went on the premises to search for the same, and no one made demand upon S. P. Condon for the taxes. The personal property was open to observation, and could have been easily and readily found. There was, however, an informal or meager *nulla bona* return as to these taxes, signed, it appears, by a special Deputy Trustee.

On the 16th of April, 1900, the Trustee went into the office of the Clerk of the Circuit Court, and appended or attached to the list the certificate required by law, thus authenticating the list. To the certificate as prescribed by the statute he added the statement that, when the list was filed by him, through oversight on his part, the certificate was omitted, and, knowing the list

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be accurate and in every way to conform to the Acts of 1897, and the omission being a mere oversight, and desiring to cure the defect, he filed and made the certificate "now for then."

On the 30th of August, 1899, on motion of John D. Caldwell, State Revenue Agent, a judgment by motion was rendered and entered on the minutes of the Circuit Court, reciting the facts stated and others, and it was ordered by the Court that the sales be confirmed (this being one among the number), and that all the right, title, interest and estate of every kind and character pertaining to said property or any particular portion thereof is hereby divested out of the respective owners and vested in the respective purchasers, as shown by said list, subject alone to the right of redemption given under the Act under which said sales were made. The Clerk was ordered to issue writs of possession as prescribed by sec. 59 of the Acts of 1899.

Complainant and his vendor, S. P. Condon, having failed to obtain any relief otherwise, filed their bill December 2, 1899, attacking and seeking to set aside the proceedings had in the Circuit Court.

It is virtually conceded, and certainly is true, that the tax title in this case is defective and the sale invalid under the ruling of this Court in the Tax Title case, 105 Tenn., 245, unless this

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case can be differentiated from that. We need not repeat the reasoning and holding of the Court in that case, and it is only necessary to say that the failure to file the certified list authenticated as the law prescribes by the Trustee with the Clerk of the Circuit Court on or before the first Monday of October, is fatal to the title of the purchaser.

It is said that there are two features which distinguish this case from the case of *Kelly v. Dugan*.

The first is the fact that there was a judgment of the Circuit Court, in August, 1899, divesting the title out of the owners and vesting it in the State, and that the title thus vested was passed by the Clerk's deed to the purchaser from him. The argument is, that the proceeding is a judgment of a Court of record and of superior jurisdiction, and was not appealed from or in any way reversed or set aside; that the proceeding is one *in rem*, and the Court having jurisdiction of both the person and subject-matter, the judgment is conclusive. If the judgment is in confirmation of the sale already made, and not an independent proceeding, manifestly it could only vest in the purchaser the title that the State obtained at the Trustee's sale in 1897, and that under the case we have cited was not a valid title, as the title was not taken from the owner by the sale. To pass the title requires, under the statute, was only a sale by the Trustee, but the

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filing of the certified list of sales with the Circuit Court Clerk duly authenticated. We are of opinion the judgment of the Circuit Court depends for its validity and force upon the certified list, and is not a substantive, independent proceeding. The right to proceed to judgment rests upon the filing of the certified list, properly authenticated. In the absence of such certified list the Court had no jurisdiction or power to render the judgment, and it is void. The proceeding to take judgment divesting and vesting title is not an independent one, but in confirmation of the sale made by the Trustee.

But it is said the authentication of the list made by the Trustee in April, 1900, cured the omission to make it at or before the time it was filed in the Circuit Court. In this connection, and bearing upon this feature of the case, it is said the requirement that the list shall be authenticated and certified and filed on or before the first Monday in October after the sale was made, is only directory, and that the Trustee may make the certificate within a reasonable time and it will relate back to the date when it should have been made.

This position, we think, is not well taken. Sec. 59 of the Acts of 1899 is in the following words:

"Be it further enacted, That on any day of any term of the Circuit Court, after the term

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when such lists of lands sold for taxes and struck off to the Treasurer of the State or sold to individuals are filed with the Clerk of said Court, it shall be the duty of the Court, upon the motion of the Trustee or any revenue agent of the State, or any purchaser, to enter a decree in form about as follows," etc. The term "such lists" means and refers to the certified lists mentioned and required by the four preceding sections. It clearly appears that the judgment is not to be entered until the proper lists are filed. It is to be based upon the properly certified list, and there is no authority for the judgment until the lists are filed, properly authenticated. The certification of the list and the confirmation of the sale, based upon such certified list, completes and perfects the sale and entitles the purchaser to a writ of possession under the Act of 1899. The Act of 1899 goes beyond the Act of 1897 by providing a short remedy to obtain possession after such sale—to-wit, filing the properly certified list, having the sale confirmed, and a writ of possession awarded. It is not the sale alone that perfects the title, but under the Act of 1897 the filing of the properly certified list, and under the Act of 1899 it is the filing of a properly authenticated list, the confirmation of the sale by the Court, and the order for a writ of possession.

But it is said again that the failure to prop-

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erly authenticate the lists when or before they were filed was a mere oversight, and the subsequent attaching and appending the authentication related back and made valid and regular the list as of the date when it was filed.

The doctrine of relation is one wholly founded upon equitable considerations. It will not be permitted to work a hardship nor to validate a void act. *Jackson v. Baird*, 4 Am. Dec., 257; *Dow v. Howard*, 8 Cowan, 277.

The bill in this case had been filed and the cause had been pending four months before the date of the authentication by the Trustee. The property is shown by the record to be worth \$14,000. It is claimed under this title at a cost of about \$136. In such case of inadequacy of price the purchaser must stand upon his strict legal rights. Equity will not be invoked to aid him in perfecting his title under such circumstances. The amount paid by the purchaser has been tendered back to him and paid into Court for his benefit. It appears that he purchased the property in unusual haste, and that the owner offered to pay the taxes, etc., and relieve the land within a very short time after the purchaser had made the purchase, and on the same day.

Proceedings to enforce the collection of taxes are summary in their character, and necessarily so, otherwise the State would be retarded in their collection and embarrassed in her finances, but at

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the same time, the modes of proceeding are laid down with particularity and in detail in the statutes, and Trustees who exercise proper diligence and ordinary intelligence in the discharge of their duties need not err or make default therein. Likewise, persons who desire to become purchasers at tax sales have ample opportunity to ascertain whether the necessary steps to make a valid sale have been complied with before they buy. While the State, on the one hand, should not be embarrassed in the collection of its taxes, on the other the citizen should not be deprived of his property for a mere pittance when the proceedings are irregular and not in accord with the law. The fact that such proceedings are necessarily summary in their character is no ground why they should be treated with so much leniency as to supply material defects caused by the failure to observe plain statutory requirements and provisions.

We have so far treated the case as it has been treated by counsel—that is, upon the assumption that the judgment of the Circuit Court of August, 1899, was in proper form and in conformity with the statute except that there was no properly certified list to authorize it, or give the Court jurisdiction to render the judgment. But we are of opinion there is a fatal defect in the Circuit Court judgment as rendered.

Sec. 59 of the Acts of 1899, Chapter 435,

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provides for sales to be made under that Act and after its passage, and the latter part of the section provides for proceedings supplementary to sales made under the Act of 1897.

The present sale was made under the Act of 1897 and not that of 1899, and hence the latter part of the section regulates the proceeding in this case. As to sales under the Act of 1897, it is provided that a decree shall be entered in about the form provided in the former part of the section, but adds that writs of possession shall be decreed to issue on compliance with the provisions of Chapter 67 of the Act; that no writ shall issue unless ordered by the Court, and this provision shall apply to all sales theretofore made and thereafter to be made, to individuals, the State or to any company or corporation.

Turning now to sec. 67 to see when writs of possession may issue under sales made under the Act of 1897, we find that it provides that before any writ of possession is issued on such sale, the purchaser shall make out a notice to the party in possession, giving a description of the property and the fact of his purchase at tax sale or under the provisions of said Act, the time of purchase, and stating that he will not earlier than thirty days thereafter apply to the Judge of the Circuit Court for a writ to put him in possession of the land, which notice shall be served by the Sheriff or Deputy

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Sheriff or Constable on the party or parties in possession, and if no one is on the premises at the time the officer is there, it shall be sufficient service to leave a copy of such notice tacked to the house or other place where it can be seen. Other provisions follow, not necessary to be set out. It is not shown in the judgment entry that these provisions as to notice were complied with as the section prescribes in order to obtain an order for a writ of possession. In other words, the judgment, as entered, does not recite that the facts prescribed by the Act appeared to the Court, nor could it do so, as the fact did not exist, and hence could not be recited in the decree. On the contrary, the decree of the Court as entered awards a writ of possession and directs it to issue without any provision as to notice, or recital that notice had been given. Being a judgment by motion, summary in its character, all the facts required by the statute should be recited in it; and if it is defective in this respect, it is void upon its face. Here there are no recitals of notice to render the judgment valid, and no proof or evidence upon which such recitals could be based. If the position be correct that the recitals in the judgment cannot be attacked or questioned in a collateral proceeding, still this will not avail, since the judgment itself shows on its face only the recitals required for sales made after the Act

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was passed, and not those required for sales made before its passage.

The judgment being defective and void upon its face, the complainant can rely, not upon the judgment, but upon such title only as he acquired by the sale in 1897, and that sale was invalid because the certificate was not filed as the law prescribes.

We need not pass upon the other errors assigned, as this holding is conclusive as to the invalidity of the title, and the decree of the Court of Chancery Appeals is affirmed.

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HOOPER v. RAILROAD.

(Knoxville. October 23, 1900.)

1. **LIMITATION, STATUTE OF.** *Bringing new action within one year after voluntary nonsuit saves from bar of.*

A cause of action otherwise barred is saved, under the statute, where an action brought thereon in due time is disposed of by voluntary nonsuit, and a new action brought thereon within one year thereafter. (*Post*, pp. 30, 31.)

Code construed: § 4446 (S.); § 3449 (M. & V.); § 2755 (T. & S.).

Cases cited: *Railroad v. Pillow*, 9 Heis., 248; *Iron Co. v. Broyles*, 95 Tenn., 612.

2. **SAME.** *Same.*

Where an action, commenced in due time in the State Court, is removed to the Federal Court, and there disposed of by voluntary nonsuit, the plaintiff may, within one year thereafter, bring and maintain a new suit on the same cause of action in the State Court, although the latter action would have been barred, but for the saving of the statute. The effect of removal to the Federal Court was to transfer the particular action, and not the cause of action, to the jurisdiction of that Court. (*Post*, pp. 30-37.)

Code construed: § 4446 (S.); § 3449 (M. & V.); § 2755 (T. & S.).

3. **PLEADING AND PRACTICE.** *Averment of identity of cause of action.*

In an action brought by an administrator to recover for personal injury of his intestate, naming a particular person as the beneficiary, it is a sufficient averment of the identity of a former action to allege "that the former suit was between the same parties, and for the same cause of action, without naming the beneficiary in either suit." (*Post*, p. 37.)

 FROM KNOX.

Appeal in error from Circuit Court of Knox County. Jos. W. SNEED, J.

Hooper v. Railroad.

W. E. DRUMMOND, WASHBURN, PICKLE & TURNER and MYNATT & FOWLER for Hooper.

WRIGHT & FRANTZ for Railroad.

McALISTER, J. Suit to recover damages for personal injuries, resulting in the death of plaintiff's intestate. Defendant company pleaded, first, not guilty, and, second, the statute of limitations of one year.

Plaintiff by replication to defendant's plea of the statute of limitations, avers that within twelve months after the cause of action accrued he brought suit against defendant company in the Circuit Court of Knox County. Thereupon defendant company, upon the ground of nonresidence, removed said cause to the Circuit Court of the United States at Knoxville, where said cause pended until the September term, 1899, of said Court, when the plaintiff took a voluntary nonsuit. Subsequently thereto, and within twelve months after the dismissal of the first suit, plaintiff instituted the present suit in the Circuit Court of Knox County. Defendant company demurred to this replication, assigning for cause:

"1. It doth not appear from said averments for whom the said S. M. Hooper was administrator in the original suit nor for whose benefit said former suit was brought in the Circuit Court of Knox County. Nor does it appear therein when

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said right of action accrued and when said former suit was brought.

"2. Because it doth not appear what disposition was made of said cause after plaintiff's voluntary nonsuit in the Circuit Court of the United States at Knoxville.

"3. Defendant says the removal of said cause was a removal of all the rights and remedies plaintiff had therein against defendant company, and said cause not having been remanded to this Court, this Court is now without jurisdiction of same.

"4. The defendant says that the running of the statute of limitations was in nowise affected or prevented by said proceedings."

The Court below sustained the demurrer of defendant to the replication, and held that the suit having been originally brought in that Court and properly removed to the Federal Court, and never having been remanded therefrom, the Circuit Court of Knox County had no jurisdiction to entertain the same, and dismissed the plaintiff's suit.

The principal question debated at the bar was whether, after suit brought in the State Court and removed to the United States Circuit Court, and there dismissed by plaintiff taking a voluntary nonsuit, it can be renewed in the State Court for a less sum than would entitle defendant to again remove same to Federal Court, and, if this is so, would such nonsuit prevent the running of the

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statute of limitations of one year. Sec. 4446, Shannon's Code, provides, viz.: "If the action is commenced within the time limited, but the judgment or decree is rendered against the complainant upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff and is arrested or reversed on appeal, the plaintiff or his representatives and privies, as the case may be, may from time to time commence a new action within one year from the reversal or the arrest." This Act has frequently been held to apply to a voluntary nonsuit by the plaintiff. *R. R. v. Pillow*, 9 Heis., 248; *Iron Co. v. Broyles*, 11 Pick., 612.

But it is argued that the removal of a cause from a State Court to the Federal Court thereby deprived the State Court of all further jurisdiction not only of that particular suit, but of the cause of action and subject-matter of that suit. Counsel for defendant company cites in support of his contention *Cox v. Railroad*, 68 Ga., 446; *Railroad v. Fulton*, 59 Ohio St., 575 (S. C., 44 L. R. A., 520.) In the latter case the Court said, viz.: "It has been repeatedly decided that, where a case has been properly removed from a State to a Federal Court, the jurisdiction of the former over the case immediately ceases, and it is its duty, in the language of the statute, to proceed no further in the cause. Its jurisdiction in that case ends with the removal.

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“The Federal Court having acquired jurisdiction of the action by its removal from the State Court, must, on principle and the reason of the statute, retain it for all purposes, for the purpose of determining whether it should be reinstated or recommenced after it had been dismissed by it or stricken from the docket, as well as for its determination on the merits. Its jurisdiction in such case does not merely embrace the suit brought and removed, but any suit thereafter brought on the identical cause of action, after the former suit has been dismissed by it, until the cause of action has been extinguished by a judgment on the merits; the cause of action—the controversy between the parties—remains subject to the jurisdiction of the Federal Court, and is forever excluded from that of the Court from which it was removed, unless remanded with the consent of the defendant; and there are cases which make this a doubtful proposition, where the cause is a removable one. No one would claim that after a case has been stricken from its dockets by the Federal Court, the State Court could determine whether it should be reinstated; and, by a parity of reasoning, the State Court cannot pass on the right of the plaintiff to recommence the action after it has been dismissed by the Federal Court. In either of these cases the question can only be determined by the Court that had full and exclusive jurisdiction of the case

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at the time. And if there be any remedial rule, statutory or otherwise, by which a case that has been dismissed for failure to prosecute can be reinstated after the time fixed by the statute of limitations has expired, the remedy must be sought in that Court. It is properly a step or proceeding in the same case. If this were not so, it would not only open the way to a violation of the policy of the statute authorizing removals, but be productive of a very inconvenient practice and much abuse. It would enable a party to permit his case to be dismissed by failing to prosecute in the Federal Court, with the purpose of recommencing it in the State Court, and thus compel the defendant to be at the trouble and expense of again causing it to be removed or submit to the jurisdiction of the State Court.

“The view we have taken finds support in the well-considered case of *Cox v. East Tennessee V. G. R. Co.*, 68 Ga., 446. It is there held that ‘when a case has been removed from a State Court to the Circuit Court of the United States, the jurisdiction of the former ceases, and after nonsuit in the Federal Court the case cannot be renewed in the State Court within six months, so as to avoid the statute of limitations. Such right is given by statute on a nonsuit in the Courts of that State, a nonsuit not being a decision on the merits.’ Referring to the statute, which reads as follows: ‘If a plaintiff shall be

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nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitations, with the original case, the Court said: 'To be thus renewed, it must be the same case as to cause of action and parties; and this is identically the same case in both respects. So that the question is, Can a case which has been removed to the United States Circuit Court be renewed in the State Court? We think not, because the action of removal, *ipso facto*, transfers the jurisdiction of the cause to the Circuit Court of the United States, and divests that of the State Court, citing *Kern v. Huidekoper*, 103 U. S., 185 (26 L. Ed., 354).

In the case before us the plaintiff averred that the cause of action in the case removed was identical with the cause of action in this present petition. If it had not been, he could not have been within the provisions of § 4991, Rev. Stat., under favor of which he claimed the right to recommence his action in the State Court."

This question arose, was well considered, and a contrary conclusion reached by the Court in *Gassman v. Jarvis*, 100 Federal Reporter, 146. Said the Court: "The contention of the defendant is that the jurisdiction of this Court upon removal is exclusive and continuous, and that, though the cause so removed is dismissed without any trial or determination of the merits, no suit can there-

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after be instituted and maintained for the same cause of action in the Court from which the removal has been taken. This contention finds support in the case of *Cox v. Railroad Co.*, 68 Ga., 446, and the case of *Railroad Co. v. Fulton*, 59 Ohio State, 575; 53 N. E., 265; 44 L. R. A. The Supreme Court of Georgia decides that where a case has been removed from a State Court into the Circuit Court of the United States, the jurisdiction of the former ceases, and after a nonsuit in the Federal Court the case cannot be renewed in the State Court, although a statute of that State expressly provides that if the plaintiff shall be nonsuited he shall have the right to recommence his suit within six months, and that such renewed suit shall stand upon the same footing as to limitations with the original case. The Court states the case for decision thus: "Can a case which has been removed to the United States Court be renewed in the State Court?" That Court holds that it cannot, and the only reason assigned is found in the following extract: "We think not, because the act of removal *ipso facto* transferred the jurisdiction of the cause to the Circuit Court of the United States, and divests that of the State Court, so that, by the ruling of the Supreme Court of the United States, in the case of *Kern v. Huidekoper*, 103 U. S., 185 (26 L. Ed., 354), at the October term, 1880; all further proceedings in the State

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Court are *coram non judice* and void.
The case of *Kern v. Huidekoper* furnishes no support for the doctrine that when a case removed into a Court of the United States has been dismissed without any trial or determination of the merits, a new suit cannot be brought on the same cause of action in a State Court.
The State Court possesses original jurisdiction for all such causes of action. The removal of the case and its subsequent dismissal, untried and undetermined, cannot, under any known rule of law, be held to be a merger of the cause of action; nor can the removal and dismissal of the cause be pleaded in abatement of the new suit brought in the State Court. When a cause of action removed into a Court of the United States is dismissed therefrom without any trial or determination of the merits, the right of action still remains in full force and vigor, unaffected thereby, and the party having such right of action may bring suit thereon in any Court of competent jurisdiction, the same as though no previous suit had been brought. See *Gassman v. Jarvis*, in (C. C.) 94 Fed., 603. . . . The decision of the Supreme Court of Ohio rests upon the authority of the Georgia case, and that case, as we have seen, finds no support in the case cited and relied upon by it. No rule of law permits the mere dismissal of a case untried and undetermined to be interposed either in bar or in abate-

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ment of a pending suit. . . . It was not the purpose of the Constitution, nor of the statutes passed in pursuance of it, to interfere with the jurisdiction of the Courts of the State, further than is necessary to secure the jurisdiction of the United States Court in respect of those causes of action which may be brought in or removed to those Courts."

We entirely concur in the views expressed by the Court in the last case cited, which we think announces the sounder rule. We applied it at the last term of this Court at Jackson, in the case of the **Western Union Telegraph Co. v. Bowers*, which is unreported.

Another ground of demurrer is that the replication failed to aver that the beneficiary of the recovery named in the present suit is the same as that named in the original suit. The replication averred that the former suit was between the same parties and for the same cause of action, without naming the beneficiary in either suit. The beneficiary named in the present suit is J. M. Lebow. We hold these averments sufficient, without alleging that the beneficiary named in the present suit was also named in the former suit.

The result is that the action of the Court in sustaining the demurrer is erroneous, the judgment is reversed and the cause remanded.

*There was no written opinion in this case.—REPORTER.

Duane & Co. v. Garretson.

DUANE & Co. v. GARRETSON.

(*Knoxville*. November 10, 1900.)

CHARGE OF COURT. *Court's refusal to give explanation of, on jury's request.*

It is reversible error in a civil case for the Court, on complaint of the jury that they cannot read his written charge, or that they do not understand his oral charge, to refuse their request for assistance and explanation, and to send them back to determine the case without adequate knowledge of the law applicable to the case, or reasonable opportunity to acquire such knowledge.

FROM CARTER.

Appeal in error from Circuit of Carter County.
H. T. CAMPBELL, J.

CURTIN & HAYNES for Duane & Co.

SIMERLY & ALLEN and KIRKPATRICK, WILLIAMS
& BOWMAN for Garretson.

WILKES, J. This is an action for damages for personal injuries. There was a trial before a jury in the Court below, and verdict for \$2,500. On motion for a new trial, \$1,000 of this amount was remitted, and judgment was rendered for

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\$1,500 and costs, and the defendants, Duane & Co., have appealed and assigned errors.

There was a demurrer in the Court below upon the ground that the averments of the declaration were not sufficiently explicit as to how the injury occurred and what caused it. This was overruled, and this is assigned as error.

We are of opinion there is no error in the action of the Court below upon this feature of the case.

There are six other errors assigned. In the view we have taken of the proceedings, it is only necessary to notice one.

The bill of exceptions states that "after the jury retired to consider of their verdict, they returned and asked the Court to explain that part of his charge not in writing, saying they did not understand it. The Court replied that all the charge was written, whereupon the jury said they could not read the Court's charge, and the Court remarked, "I am not surprised at that. Retire, gentlemen, and consider of your verdict."

This action of the Court is assigned as error, and we think the assignment well made.

The charge of the Court was in writing. So far as the record shows, there was no request that it be reduced to writing. We do not think this was material for the purposes now under consideration. It was evident, from the statement made by the jury, that the charge was delivered

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to them, and that they could not read it (presumably from the fact that the jury could not decipher the learned Judge's handwriting). It was also evident that they did not understand the charge and believed it incomplete as given to them in writing.

While there was no express request that it be read to them or again delivered, the statement made by the jury was equivalent to a request, and clearly indicated the necessity for instructions. It was the duty of the Court, under these circumstances, to have read the charge to the jury or given them such instructions as would aid them in knowing what they were. To send them back without aid or instruction, under these circumstances, was to leave them entirely at sea as to the law of the case and virtually submitting the case to them without a charge, or, perhaps worse, with a charge which they did not understand.

Without examining the many errors assigned, we think this fatal to the proceeding in the Court below, and the judgment is reversed and cause remanded for a new trial. The appellee will pay costs of appeal.

Coal Co. v. Land Co.

COAL CO. v. LAND CO.

(*Knoxville.* November 17, 1900.)

CORPORATIONS. *Rights of creditors of insolvent concern defined.*

Where a corporation—viz., a land company—mortgaged its property to secure a proposed bond issue of \$25,000 to raise funds to pay debts, and sold and issued of this amount only \$11,250, and these to its directors and stockholders at par, and was unable to sell the remainder of the issue, these bondholders, in settlement of the company's affairs as an insolvent concern, are entitled, as against general creditors, to payment in full out of the proceeds of the mortgaged property, if sufficient for that purpose, and not merely to payment out of same in the proportion that the actual bond issue of \$11,250 bore to the proposed bond issue of \$25,000.

FROM CAMPBELL.

Appeal from Chancery Court of Campbell County.
HUGH G. KYLE, Ch.

J. E. JOHNSTON and H. K. TRAMMELL for
Coal Co.

E. H. POWERS and INGERSOLL & PEYTON, *contra.*

McALISTER, J. The original bill in this cause was filed and sustained as a general creditors' bill

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for the purpose of winding up the affairs of defendant company as an insolvent corporation. The only question presented to this Court upon the record is one of priority between a certain judgment creditor of said corporation and its mortgage bondholders.

The facts necessary to be stated, as found by the Court of Chancery Appeals, are substantially as follows:

April 1, 1893, the defendant company executed a mortgage or deed of trust to George W. Welsh, of Boyle County, Ky., to secure the payment of its bonds of the denomination of \$50 each, amounting in the aggregate to \$25,000, which its board of directors authorized to be issued and sold for the purpose of paying its indebtedness contracted in the purchase of lands and for other purposes. The bonds thus secured were dated April 1, 1893, and bore interest at six per cent., payable semiannually at the Farmers' National Bank, of Danville, Kentucky. The principle of said bonds was also made payable at said bank, and matured April 1, 1898. The mortgage or deed of trust to Welsh, embodying a form of the bonds issued, contained this recital:

"This bond is one of a series of 500, aggregating \$25,000, issued in pursuance of an order of the board of directors of said London & New York Land Co., passed February 15, 1893."

When these bonds were issued the complainant,

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the East Tennessee Coal Co., had a suit pending against the London & New York Land Co., and on November 10, 1893, it recovered a judgment against the latter company for \$8,552.51 and costs. July 2, 1894, \$2,360 were paid on this judgment. It is practically conceded, says that Court, that complainant company can assert no lien by virtue of its judgment, and it is certain that the mortgage was properly registered before the complainant company fastened any other lien on the property of defendant. That Court, continuing, says:

“These bonds of the defendant company—that is, \$11,250—were issued for the purposes stated in the mortgage, and as disclosed by the proof, in order to raise money with which to pay the debts of the company. Its indebtedness at the time was about \$25,000, and the authorized issue of bonds at par would have liquidated this indebtedness. It was the idea and purpose at the time it was determined to issue the bonds for the stockholders of the company to take 25 per cent. of their respective holdings in stock in the bonds, and thus the whole authorized issue would be taken. A number of the stockholders, however, either from inability or because they were becoming apprehensive as to the financial success of the company, refused to carry out the arrangement and take the bonds. Certain stockholders did take bonds under this arrangement amounting, as stated, to \$11,250. The other \$13,750 of the authorized

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issue were never issued and put upon the market. It appears from the proof that the officers of the company were entirely willing to sell the remainder of these bonds, but were unable to do so. The stockholders taking the \$11,250 of the bonds paid par for the same, and the money thus realized was used in paying debts and expenses of the company, and interest on the bonds thus disposed of, excepting \$2,000 that was lost by the failure of a bank in Kentucky, in which something over \$4,000 was deposited. . . . So far as is disclosed by the record, the officers expected, when the \$11,250 of bonds were taken, that the remainder could be disposed of and the money realized from them applied to the payment of the debts of the company. The parties taking the \$11,250 of bonds were stockholders, and some of them directors of the defendant company.

“After the failure of the company to dispose of the remainder of its unauthorized issue of bonds, it made no further efforts to secure or pay the debt of complainant.”

The outstanding indebtedness of the company at the time this case was tried, exclusive of the bonds issued and sold, amounted to \$15,000 or \$18,000. Its properties, under the evidence, will not pay the \$11,250 of bonds.

Now, it is insisted by complainant that its judgment against defendant company is of equal dignity with the claims of the bondholders and

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entitled to share ratably with them in the properties of the company covered by the mortgage. In support of this position it is argued that when each stockholder subscribed for a certain number of the bonds of the defendant company it was with the understanding that bonds amounting to \$25,000 would be issued and sold to pay the debts of the company, and that creditors who received no part of the \$25,000 should stand as high as the bondsmen furnishing the money; that each holder of bonds issued is only secured under the mortgage in the proportion that his bonds bear to the whole amount authorized to be issued and secured by the mortgage. Otherwise stated, each bond is one of the series, and the holder of the bonds is secured by the mortgage to the extent of his aliquot part of the property conveyed considered as a security for the whole series.

It is conceded by learned counsel in his able argument that the rule would be different if the issue of bonds was not definitely known and determined. It is also conceded that if there was nothing in the trust deed or in the bond itself to put the holder upon notice just what his proportionate interest in the assets was, then he might subject the entire assets included in the trust deed to the satisfaction of his bond. Counsel cites in support of his position Thompson's Commentaries on the Law of Corporations, viz.:

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“The proportionate interest of each bondholder in the proceeds of the sale is to be determined by the contract of hypothecation which is embraced in the mortgage and in the bonds, when read together as one contract. Under ordinary railroad mortgages (which are issued as a security for the whole number of a series of bonds, which number is definitely stated in the mortgage) each bond carries with it only a fractional interest in the proceeds of the sale of the property, to be determined by the proportion which its amount bears to the whole amount secured by the mortgage, whether the whole amount has been issued or not. Thus, if the mortgage (trust deed) is created to secure a series of bonds of the sum of \$1,000 each, amounting in the aggregate to ten million dollars, upon a distribution of the proceeds arising from a sale to foreclose the mortgage, each bondholder will be entitled to the same proportion which he would receive . . . if the whole ten thousand of the bonds had been in fact issued.” *Ib.*, sec. 6229.

“Such a mortgage is a security for the whole number and for each and every bond recited in it; by the terms of the instrument the bonds stand in equal protection—each bond carries only a fractional interest of the property mortgaged.” Sec. 6229.

The contract with the individual bondholder is no more than that he shall have his due propor-

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tion of the security the mortgage on its face implies. Thompson's Commentaries on the Law of Corporations, Vol. 5, sec. 6228. The cases cited by Mr. Thompson for his text are *Barry v. Missouri R. R.*, 34 Fed. Rep., 829, and *Hodges' Appeal*, 84 Pa. St. 359, 362.

We have examined the cases cited by Mr. Thompson in support of the text, and find they have no bearing on the question presented in this case. In *Barry v. Railroad*, 34 Fed. Rep., 829, Judge Wallace states the rule thus: "Where a mortgage is a security for the whole number of a series of bonds, in a distribution of the proceeds of the sale of the mortgaged property, each bond carries only a fractional interest in the proceeds of the property, to be ascertained by the proportion which its amount bears to the whole amount secured."

This, we take it, is a statement of the general rule that where the mortgage security is insufficient to pay the entire amount of bonds secured, each bondholder will share in the distribution of the proceeds of the security in the proportion which his holdings bear to the whole amount secured. But Mr. Thompson has introduced into his text a feature not found in the case—namely, that this rule applies whether the entire series of bonds be issued or not, or whether they are intended to be issued or not. In *Barry v. Railroad*, *supra*, the whole amount of bonds had been actually is-

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sued, but the railroad had purchased part of them back before maturity and had reissued them, and the question was whether these reissued bonds or bonds for which they were exchanged would participate in the mortgage security, or, in other words, whether the lien of the mortgage would be affected by the substitution of the new bonds. The Court held there was no principle of law of corporations or mortgages which forbids a corporation that has issued a series of mortgage bonds from purchasing part of them back and reissuing them before maturity, when the financial interests of the corporation will be thereby promoted, unless the organic law of the corporation forbids the exercise of such a power. If it is lawful for the corporation to do this, it is wholly immaterial whether it pays money upon such a purchase or exchanges other bonds instead. The Court held that in such a case the lien of the mortgage would not be extinguished unless, of course, payment was made with intent to extinguish the debt.

In *Chaflin v. Railroad*, 8 Fed. Rep., it appeared that certain mortgage bonds had been acquired by the railroad in its refunding operations and the question was whether the company, after having acquired them, could keep them alive and reissue them so that they would carry with them their original mortgage lien. Chief Justice Waite, who delivered the opinion of the Court, said: "As

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against other bondholders secured by the same mortgage, I cannot believe there is a doubt of the power of the company to put out and keep out the entire issue up to the time the bonds became due. The contract with the individual bondholder was no more than that he shall have his due proportion of the security the mortgage on its face implies." In that case it also appeared that the entire series of bonds had been issued, and the question was in respect of the right of reissued bonds to share in the mortgage security.

The other case cited by Mr. Thompson for his text is *Hodges' Appeal*, 84 Pa. St., 359. In that case it appeared that one Harmon executed and delivered to trustees a mortgage on property to secure the payment of two hundred hands, each for the sum of five hundred dollars. The property to be distributed under the mortgage realized \$6,894.98. It appeared that the entire series of bonds, two hundred in number, had in fact been issued. The real question in that case was whether certain claimants were *bona fide* holders of the bonds on account of certain informalities in their acquisition.

The Court held that where a mortgage is a security for the whole number of a series of bonds, in a distribution of the proceeds of the mortgaged property, the holders of the bonds share *pro rata* in the distribution, and if a holder of

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a bond is entitled to its proceeds other holders cannot set up any informality in the manner of its acquisition.

In the case at bar more than one-half of the series of bonds were in fact not issued, nor were they withheld by the corporation for the purpose of being issued or manipulated for its own purposes at some future time, as frequently occurs in railroad securities.

Now, in such a case it would be a strange doctrine to hold that each separate bondholder is only secured by the mortgage to the extent of his aliquot portion of the property covered, to be determined by the proportion his bond holdings bear to the whole amount originally contemplated to be issued, but which were not in point of fact issued.

We think the true rule is that the security inures to the benefit of each bondholder in the proportion which his bondholdings under the mortgage bear to the entire amount actually issued and intended to be issued.

Affirmed.

Rosenbaum v. Davis.

ROSENBAUM v. DAVIS.

(*Knoxville*. November 17, 1900.)

1. HOMESTEAD. *Not defeated by husband's voluntary conveyance to wife.*

The wife's right to homestead is not defeated by the fact that the husband has made to her a voluntary conveyance of the homestead property, which has been set aside, at the suit of the husband's creditors, as fraudulent in law merely. (*Post*, pp. 52-56.)

Cases cited: *Cowan v. Johnson*, 2 Shan. Cases, 41; *Ruohs v. Hooke*, 3 Lea, 302; *Nichol v. Davidson County*, 8 Lea, 389.

2. SAME. *Application for, not barred, when.*

An application for assignment of homestead is not barred which is made in the Chancery Court, after remand of the cause to execute a decree of this Court adjudging a conveyance of the homestead property from husband to wife void in law, and directing the property to be sold for payment of the husband's debts, there being no question of homestead made in the original pleadings. Such decree is not final in such sense that it can be pleaded as *res adjudicata*. (*Post*, pp. 56-59.)

Cases cited: *Railroad v. Bridgeman*, 95 Tenn., 624; *Thompson v. Thompson* (oral opinion).

FROM SULLIVAN.

Appeal from Chancery Court of Sullivan County.
HUGH G. KYLE, Ch.

Rosenbaum v. Davis.

CURTIN & HAYNES for Rosenbaum & Co.

WASHBURN, PICKLE & TURNER, H. G. PETERS,
and C. J. ST. JOHN for Davis.

MCALISTER, J. The question presented for determination upon the record is whether Evan Davis and wife are entitled to homestead in the proceeds of a house and lot sold in this cause. Complainants, who are judgment creditors of Davis, resist the claim to homestead upon two grounds, namely: First, equitable estoppel; and, second, *res adjudicata*.

The facts found by the Court of Chancery Appeals are that several years since complainants, as creditors of Evan Davis, filed the original bill in these causes alleging that Davis had fraudulently conveyed to his wife the real estate described, and asking that said conveyance be set aside and the property subjected to the payment of their claims.

Such proceedings were had that, at the September term, 1898, of this Court, a decree was pronounced adjudging said conveyances fraudulent in law, but not fraudulent in fact. Thereupon said consolidated causes were remanded to the Chancery Court of Sullivan County for further proceedings.

When the cause reached the Chancery Court, and before any steps had been taken for the execution of the decree of this Court, Davis and

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wife presented a petition to be allowed homestead in one of the pieces of real estate embraced in the fraudulent conveyance. The complainants first demurred and then filed an answer to the petition. It being impracticable to allot homestead in kind in the storehouse and lot in which it was claimed, by agreement of parties the property was sold reserving the right to claim homestead in the proceeds of sale. The Court of Chancery Appeals, affirming the decree of the Chancellor, adjudged that petitioners were entitled to a homestead.

Complainants appealed, and their assignment is that the Court of Chancery Appeals erred in holding that Davis and wife are, upon the facts and pleadings as they appear in this cause, entitled to homestead and that they are not estopped, and in holding that said former decree was not *res adjudicata* upon the question of homestead, while said decree stands unimpeached.

The question presented for our decision has frequently arisen and been adjudicated by this Court. In the case of *Cowan, McClung & Co. v. Johnson. et al.*, decided at Knoxville in 1876 and reported in Vol. 2, Shannon's Tenn. Cases, p. 41, it was held that the wife who joins her husband in a deed fraudulently conveying his home and only property, thereby parts with her right to homestead therein. In that case the deed was set aside at the suit of creditors of the husband, the

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Court adjudging the conveyance fraudulent in fact. The ground of the decision in that case was equitable estoppel, the Court finding that the wife participated in the fraudulent conveyance.

In the case now being decided, the conveyances from Davis to his wife were adjudged not fraudulent in fact, but only fraudulent in law.

The next case to which our attention has been called is that of *Ruohs v. Hooke*, 3 Lea, 302, in which it was held that a wife is entitled to a homestead in lands fraudulently conveyed to her by her husband for the purpose of hindering and delaying his creditors, but in that case the decision was rested upon the ground that the conveyance to the wife was only fraudulent in law. The Court distinguished that case from the case of *Cowan v. Johnson*, in this, that the wife had not participated in any fraud. "There is," said the Court, "but fraud in law growing out of a gift by the husband to the wife which he was unable to make by reason of his indebtedness. The wife simply accepted the bounty, or did not dissent. On what principle," said the Court, "it can be held that the homestead right secured by the Constitution of 1870, not only to the head of the family exempt from sale under legal process during his life, but which inures to the benefit of the widow and the children during the minority, can be forfeited in favor of the creditor by a voluntary conveyance made to the wife, we are

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unable to see. The conveyance to the wife is void as to creditors and is set aside as to the right of the creditors existent at the time of the conveyance, so that the creditor stands as if it did not exist. This is clear. But how the creditor stands any higher or acquires an additional right by setting aside the conveyance, beyond what he had before it was made, it is difficult to see. Before the conveyance he could only sell the property of his debtor subject to the homestead, and it could not be sold by legal process."

The Court therefore held that the deed of gift to the wife, though voluntary and void as to creditors, does not defeat the homestead right nor enlarge in any way the right of the creditors as they existed before it was made.

The case of *Nichol v. Davidson County*, decided in 1891, and reported in 8 Lea, 389, held that the husband's fraudulent conveyance of the homestead to the wife under the Act of 1868 would defeat the wife's claim. The decision in that case, however, was based on the holding that under the Act of 1868, the wife had no interest in the homestead, and the husband alone could convey it. That case, however, approves in principle, *Cowan v. Johnson*.

We conclude, therefore, that there is no equitable estoppel in the present case against the wife's right to assert homestead in this land by reason

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of any participation in the fraudulent conveyance. On this point the Court is unanimous.

It is next insisted that the right of homestead was necessarily involved in the litigation in which the conveyances were adjudged fraudulent, and that the husband and wife having failed until after the final decree in that cause to assert a claim of homestead, the matter is now *res adjudicata*. As already stated, the petition of Davis and wife asking an allotment of homestead was filed in this cause, but not until the decree of the Court had been rendered adjudging the conveyances fraudulent in law, and not until said cause had been remanded to the Chancery Court for further proceedings in conformity with that decree.

The claim of complainants that the right to homestead is *res adjudicata* is rested principally upon the case of *Joyce v. Tomlin*, decided at Jackson in 1884 and reported in 2 Shannon's Cases, 143.

The syllabus of that case is, viz.: "Where the creditors of a husband file a bill against him, his wife and son to set aside a conveyance made by him to them on the ground that it was voluntary and intended to hinder and delay his creditors, and praying for a sale to pay their debts, and the bill is taken for confessed as to the husband and wife, and the cause is heard upon the bill, order *pro confesso*, answer by guardian *ad litem* of the infant son and a de-

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cree is rendered declaring the conveyance fraudulent and ordering the land sold, which was done, and a writ of possession issued and the wife turned out of possession, the question of the right to homestead is adjudicated. The wife being a party to the suit, was bound to have interposed her claim for homestead, and not having done so, she is precluded from asserting any right to homestead. It was further held that a bill of review will not lie to review such a decree for error apparent on its face."

The case was decided by a divided Court, Judges Turney and Freeman dissenting.

It will be observed in that case the husband and wife permitted the homestead to be sold without asserting any claim to it; the sale was confirmed, and the purchaser went into possession. The decree was a final decree. The wife, by next friend, then sought by bill of review to set aside that decree for error of law apparent on its face. The Court held that the question was adjudicated and the homestead lost.

It is insisted on behalf of petitioners that *Joyce v. Tomlin*, is not controlling, for the reason that the right to homestead in this case was asserted before final decree.

As already stated, this Court had pronounced a decree adjudging the conveyance fraudulent and remanding the cause for further proceedings in

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conformity with the decree, and on the remand the petition for homestead was filed.

Complainant's counsel, resisting the allowance of homestead, contend that the decree of the Court was such a final decree as would support a plea of *res adjudicata*.

It is insisted that decree settled all the rights of the parties. It adjudged the conveyances fraudulent and set them aside. It granted recoveries in favor of complainant's creditors and adjudged certain priorities and also the costs of the cause, and remanded the cause for the execution of the decree. It is insisted that decree was to all intents and purposes final, that it could not be changed even by this Court except upon bill of review or upon grounds of fraud; that it had passed entirely beyond control, except by a special proceeding to set it aside, and that so long as it remains in force it is as binding and as much *res adjudicata* as if the property had been sold in compliance with the directions of the decree.

On the other hand, it is insisted on behalf of petitioners that the decree of this Court was not a final decree in its strict technical sense, and unless final in that sense it will not support the plea of *res adjudicata*, citing *Railroad v. Bridgeman*, 11 Pickle; *Thompson v. Thompson*, Knoxville, September term, 1899.

In the last case it appeared that Mrs. Thompson was made a party to the original bill and

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suffered a judgment *pro confesso*. The legal title to the property was in her husband, and the creditor's bill alleged that defendants were entitled to homestead. The Court adjudged defendants were entitled to homestead in the particular property, and it was actually assigned. Before confirmation, however, Mrs. Thompson filed an original bill asserting an equitable title to the property in question, and enjoining any further proceedings under the creditor's bill. The plea of *res adjudicata* in the original cause was interposed, and this Court at last term held that decree was not final in such sense as to support that plea.

A majority of the Court are of opinion that the decree of this Court adjudging fraudulent said conveyance from Davis to his wife, and remanding the cause, was not such a final decree as would support the plea of *res adjudicata*, and that the petition for allotment of homestead filed by Davis and wife after the remandment was seasonable.

On this latter proposition Chief Justice Snodgrass and the writer do not agree with the majority, but are of opinion the decree of this Court was, to all intents and purposes, a final decree, and that it was too late, upon the remand for the execution of the decrec, to set up homestead.

The result, however, is that the decree of the Court of Chancery Appeals is affirmed.

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106	60
116	375
117	568

TALBOTT v. MANARD.

(Knoxville. November 17, 1900.)

1. USURY. *What is.*

A borrower's contract to pay commission or other compensation to a broker for services to be rendered in securing a loan, is valid and enforceable when the broker induces a third person to advance and loan the money, but usurious and void when he himself advances the money and makes or takes the loan on his own account. (*Post*, pp. 64-66.)

2. RESCISSION. *Not granted upon partial failure of consideration.*

A deed, executed in payment and consideration of the amount "legally due" from the vendor to the vendee, and secured by mortgage on the lands conveyed, will not be set aside, at the suit of the vendor, on complaint that there had been included in the mortgage debt, certain commissions to the vendee, which were carried into the purchase price, supposed, at the time, to be due the vendee for securing the loan to be made by a third person, but which were not in fact due, because the vendee had himself advanced the money and taken the loan for his own benefit. The vendor's remedy in such case is not rescission, but recovery of balance of purchase price represented by the amount of such commissions. (*Post*, pp. 66, 67, 72.)

Cases cited: *Rose v. Mynatt*, 7 Yer., 30; *Maury v. Lewis*, 10 Yer., 114; *Bartee v. Tompkins*, 4 Sneed, 624; *Cox v. Waggoner*, 5 Sneed, 542.

3. SAME. *Not granted for inadequacy of consideration.*

Rescission of an executed sale of land will not be granted the vendor for mere inadequacy of consideration, unless it be so great as to shock the conscience and afford, *per se*, evidence of fraud. And even in such case it may be explained by showing that the transaction was entered into intentionally and with full knowledge, by parties having legal capacity, and without fraud or imposition on the part of the vendee. The inadequacy shown in this case is not sufficient to raise pre-

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sumption of fraud, and is besides explained satisfactorily.
(*Post*, pp. 68-72.)

Case cited: *Mann v. Russey*, 101 Tenn., 596.

4. SAME. *Defeated by laches.*

Nothing can induce a Court of Equity to exercise its extraordinary jurisdiction for the rescission of contracts, save conscience, good faith, and reasonable diligence. Hence, a vendor, if otherwise entitled to rescission, will be repelled on account of his laches, who, for nearly two years, has delayed to prefer his claim for rescission of an executed contract, with full knowledge of all his grounds of complaint, in the meantime renting the land from the vendee and permitting him to put valuable improvements upon it. (*Post*, pp. 68-72.)

Cases cited: *Kunckolls v. Lea*, 10 Hum., 576; *Ruohs v. Bank*, 94 Tenn., 57; *Woodfolk v. Marley*, 98 Tenn., 467.

FROM JEFFERSON.

Appeal from Chancery Court of Jefferson County.
Jno. P. SMITH, Ch.

C. T. RANKIN, SHIELDS & MOUNTCASTLE for
Talbott.

WASHBURN, PICKLE & TURNER and EUGENE
HOLTSINGER for Manard.

BEARD, J. On March 21, 1894, the Complainant, Oscar Talbott, executed his note to G. W. Pickle for \$7,500, due two years after date with interest from date, and to secure its payment, conveyed (his wife joining in the deed) to W.

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R. Turner, as trustee, a tract of valuable land of four hundred acres lying in Jefferson County. On March 21, 1895, Talbott executed a note payable to the defendant, Manard, due one year after date, and secured it also by a trust deed on the same property. This trust deed was also made to W. R. Turner, trustee, and the note secured by it, embraced the legal interest for one year on the original note of \$7,500, which was the property of Manard, and also a small judgment against Talbott of which Manard was the owner. On the eighteenth of March, 1897, no part of these debts having been paid, Oscar Talbott and his wife, and one Bradley, who was their son-in-law, and his wife, joined in a deed in fee, containing full clauses of warranty, by which they conveyed to Manard this property, reciting as a consideration thereof, "the sums of money legally due on the two trust deeds," and the right on the part of Talbott to occupy the land for a further term of twelve months, rent free. This deed was duly acknowledged by all of its makers and delivered to the vendee, and from that time until the filing of the present bill, to wit, on the twenty-third of February, 1899, the complainants occupied at first the whole and afterwards a portion of the property as the tenants of Manard.

Complainants in this bill seek a rescission of the contract of sale, as evidenced by the war-

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ranty deed and a cancellation of the deeds of trust, and if this cannot be done, then a decree converting the warranty deeds into a mortgage security for the true debt of complainant, Oscar Talbott, to defendant, Manard.

The prayer for relief is rested upon two grounds, first, it is insisted that all these instruments were procured through fraud and duress upon the part of Manard, although the bill concedes that at the time of the execution of the first trust deed, in 1894, the latter advanced for Talbott \$6,714.75, which, with interest, was unpaid at the time of the making of the deed in fee in March, 1897; and, second, that there was a parol contemporaneous agreement between the parties at the time of the execution of this last instrument, that Manard, after retaining enough of the land conveyed to him to discharge the debts due him from Talbott, was to reconvey to him the balance, which agreement, it is averred, had subsequently been repudiated by Manard.

The Court of Chancery Appeals, in their opinion, find every material averment of the bill against complainants. They relieve Manard of all charges of fraud, oppression, machination, or device in obtaining these various conveyances, and find that they were executed voluntarily and understandingly by the complainants, and for a valuable consideration. They also report that there was no parol contemporaneous agreement at the time of the exe-

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cution of the deed in March, 1897. That Court, however, decreed that this last conveyance was in legal effect a mortgage, which should be held as security for the debts due Manard, and the cause was remanded to the Chancery Court in order to ascertain the amount of these debts.

We understand this decree to be rested upon one of two grounds, or possibly upon both. The bill charges, and that Court finds, first, that in the \$7,500 note Manard embraced an excess of \$785.25, over and above the sum of \$6,714.75 advanced by him to Talbott, which sum was carried forward and formed a part of the consideration of the final warranty deed; and, second, that there was a great disparity between the value of the consideration paid and the land conveyed to Manard.

The defendant, Manard, in his answer, admits that this excess over and above the amount paid by him for Talbott was embraced in the original note, and ran through the subsequent transactions.

As to this feature of the case the Court of Chancery Appeals finds as follows: "That Manard, when approached by complainant for a loan to remove judgments resting upon his 400 acre tract of land, said that he would procure it for him, but would charge him \$785.25 as commission for doing so; the loan to be secured, etc. . . . Complainant Talbott agreed to this proposition. At the time the proposition aforesaid was made,

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Manard expected to make the loan for General Pickle, as the latter had some time before that requested him to place a loan for him, Pickle, if a favorable opportunity offered and the loan could be secured. . . . With this view the note for \$7,500, evidencing the loan, and which embraced the commission aforesaid, was drawn payable to General Pickle, and the trust deed to secure the note was made to defendant Turner, as if the loan was made to General Pickle. As a matter of fact the money, \$6,714.75, actually turned over to Talbott . . . was advanced by Manard out of his own funds, and as he did not see General Pickle for some time, he determined to carry the loan on his own account, and when after this, General Pickle was seen, he assented to the loan being so carried."

Upon this state of facts it is insisted that by thus agreeing to procure a loan for Talbott, Manard became the agent of the former, and was bound to exercise good faith to his principal, and that Manard's concealment from Talbott of the changed condition of the loan tainted the note and mortgage security, and was a vice which entered into all the subsequent dealings of the parties, including the deed of March 18, 1897.

That it was the duty of Manard, upon this altered condition as to the loan, to notify Talbott that he had not earned his commission, and credit the note by the sum representing this com-

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mission is undoubtedly true. But did his failure to do so make the note and trust security, or the warranty deed thereafter executed, either void or voidable? It will be observed Manard's agency was to procure the loan, and for this he was to charge the commission. Upon the contract thus made, if he had succeeded in filling it, his right to charge a commission or compensation for his service is undisputed. Such an agreement is not usurious.

This undertaking, as has been seen, is reported by the Court of Chancery Appeals to have been in good faith, and the note was taken to a third party upon an assumption that he would carry the loan. Thus, when the note and mortgage were executed, and the money was paid to Talbott, there was no element of bad faith or usury on the part of Manard. He may have charged too high a commission for his service, but this would not serve to impeach the transaction. To this time and point it was a contract enforceable in law.

Does the fact that subsequently he concluded to carry the loan himself have a retroactive effect and make void or voidable the whole contract, which before that was good? Could Talbott, if informed at any time while the \$7,500 note and trust deed were alive of the true history of this transaction, have avoided both upon the ground that his agent had concealed from him the fact in question? As-

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surely not. The utmost he could have done would have been to avoid so much of the note as embraced this commission. So it is the real transaction in the present case does not fall within the rule invoked by counsel for complainant, to wit: "If one person is placed in such fiduciary relations towards another that the duty rests upon him to disclose, and he intentionally conceals a material fact with the purpose of inducing the other to enter into an agreement, such concealment is an actual fraud, and the agreement is voidable without the aid of any presumption." 2 Pom. Eq. Jur., Sec. 956.

But if it were conceded that this view is erroneous in its application to this note and mortgage, it certainly is not so far as the deed in fee executed in 1897 was concerned. The relation of principal and agent extended only to the procurement of the loan. That relationship terminated in 1894. Talbot was under obligation to pay to Manard at least the money advanced to him and legal interest, as well as the judgment against him which Manard had bought. These items constituted a valuable consideration for the warranty deed thus executed. It is true Talbot would be entitled to recover the commission charged in 1894, and interest from March 21, 1894, but this would not affect the integrity of the deed or cut down the title which Manard had acquired through it.

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As to the second of these facts—that is, the disparity between the price paid and the value of the property purchased, will that authorize the interference of the Chancery Court in favor of Talbott?

The Court of Chancery Appeals report on the subject of the value of the property in question as follows: “At the time this deed was executed (March, 1897) the tract or farm, although run down . . . and its fences and improvements greatly out of repair, and although financial depression then prevailed . . . was worth, according to . . . Manard himself, . . . \$10,000. Under the . . . weight of the testimony, it was worth from \$12,000 to \$14,000. Some witnesses put its value at \$20,000, some \$18,000, some \$16,000, some \$14,000, and some \$13,000. Under the weight of the most reliable evidence a reasonable estimate of its value in March, 1897, was \$13,000.” For this property Manard gave up his debts, which then amounted to about \$8,000.

Opinions as to value are always more or less speculative and uncertain. This is evidenced by the wide divergence of views of the witnesses in this case. But conceding the fact to be that the property conveyed was worth \$5,000 more than Manard paid, is that alone sufficient to authorize a Chancery Court to decree a rescission of the contract?

In *Mann v. Russey*, 101 Tenn., 596, this Court

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said: "Mere inadequacy of consideration . . . will not induce a Court of Equity to avoid the contract at the instance of either party to it. . . . Parties competent to contract have a right, without legal interference, to make their own agreement and fix any price they see proper to receive or pay for property. Whenever they do this deliberately and knowingly, then their contracts are beyond impeachment, whether the price agreed upon be very great or very small. It is only when the contract presents unexplained a case of gross inequality that the presumption of fraud arises. This presumption, however, is one of fact, and therefore rebuttable."

Mr. Pomeroy, in Sec. 928 of 2d Vol. of his Equity Jurisprudence, says: "If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity." And again in Sec. 926 he says: "If the parties being in the situation, and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, Courts of Equity should not, and will not, interfere with such valuation." This author, however, recognizes in his note to Sec. 927, that the inadequacy of consideration may be so great as to place the burden upon the party seeking to enforce the contract, of showing affirmatively that the result is a deliberate and intentional transaction by the parties. It is true that in

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rare cases it has been held that gross inadequacy—that is, inadequacy so gross as to shock the conscience—is decisive evidence of fraud, and of itself ground for rescission. But, then, fraud, and not inadequacy of price, is the only cause for equitable interference. 2 Pom., Sec. 927.

We do not think in the present case that the inadequacy of consideration is so great as to shock the conscience of the Court or raise a presumption of fraud within the rule of *Gwinne v. Heaton*, 1 Bro. Ch. 1, or *Mann v. Russey*, supra.

But if it were conceded sufficient to raise a presumption of fraud, yet we think the finding of facts by the Court of Chancery Appeals fully rebuts it. Talbot in full possession of his faculties without pressure, fraud, deceit, duress, or corrupt device on the part of Manard, came to him, “with the proposition to let” him have the property, and Manard accepted it. Using the words of that Court, “he (Talbot) simply recognized, in view of his habits, age, and environments, that he could not pay the mortgage debts on the land, and he was willing to let Manard have it at the amount of the debts on it, rather than have a foreclosure sale of it under the trust deeds.”

Upon such facts we think a Court of Equity is without excuse for interposition, unless its office is to stand as the guardian of all persons who

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contract, and see that absolute equality prevails between them.

But if it were granted that we are wrong in these conclusions, yet there is another well recognized rule of equity practice, which repels complainants in their effort to rescind, and that is, nothing can induce a Court of Equity to exercise its extraordinary power in decreeing rescission of contracts, save conscience, good faith, and reasonable diligence. When one with full knowledge of the fraud of which he complains sleeps on his rights, he will be repelled. *Knuckolls v. Lea*, 10 Hum., 576; *Ruohs v. Bank*, 94 Tenn., 57; *Woodfolk v. Marley*, 98 Tenn., 467.

In the present case the complainants waited nearly two years after the making of the warranty deed before they assailed it. They occupy the property as the tenants of Manard all that time, and see him make valuable improvements upon it, without protest. They make no claim that during this period they were ignorant of their rights or of what they now allege to be the unscrupulousness of Manard's conduct or the injustice of his claims. This being so, if ever entitled to it, they come too late for relief. The result is that the decree of the Court of Chancery Appeals is reversed.

In one respect, however, partial relief may be granted to complainant Oscar Talbott under the prayer for general relief. As has been stated,

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the bill alleges that the original note of \$7,500 contained an overcharge of \$785.25. The answer of Manard gives a detailed statement of the conditions under which this sum was carried into this note. While the answer insists upon the good faith of this charge, yet it is evident upon its admissions that Manard was not entitled to this sum under his agreement, and as it constituted a part of the consideration for the deed in fee, it should be accounted for by him. To the extent of this charge there has been a failure of consideration, for which Manard may be compelled to account on these pleadings. *Rose v. Mynatt*, 7 Yer., 30; *Maurv v. Lewis*, 10 Yer., 114; *Bartee v. Tompkins*, 4 Sneed, 624; *Cox v. Waggoner*, 5 Sneed, 542.

A decree will be entered here in favor of complainant, Oscar Talbott, against defendant, Manard, for this sum of \$785.25, with interest from March 21, 1894, the date of the first note. The complainant, Oscar Talbott, will pay three-fourths of all the costs of the case, and defendant Manard one-fourth.

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RAILROAD v. HORNE.

(Knoxville. November 17, 1900.)

1. COMMON CARRIER. *Freight rates for interstate shipment.*

The freight rate stipulated, in a through bill of lading, for interstate shipment over several lines, controls absolutely until the carrier shows due publication of schedules of rates approved by the Interstate Railway Commission fixing a different rate for such shipment.

2. SAME. *Same.*

The Court presumes, when the question is involved in a contest between a combination of interstate carriers and a shipper, that the Interstate Commerce Commission did its duty, and directed and required publication of the schedules of rates of such carriers upon approval of same.

3. SAME. *Same.*

And the burden is upon the carriers in such case to show that the prescribed publication of the schedules of rates was made.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. Jos. W. SNEED, J.

WRIGHT & FRANTZ for Railroad Co.

H. H. TAYLOR for Horne.

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CALDWELL, J. This is an action of replevin brought by John F. Horne against the Atlanta, Knoxville & Northern Railway Company for the possession of "one barrel of alcohol and five barrels of spirits," consigned to him at Knoxville, Tennessee, by Corning & Co., at Peoria, Illinois, over the road of the St. Louis, Peoria & Northern Railway Company and connecting lines of railway, that of the Atlanta, Knoxville & Northern Railway Company being the last of them.

The initial carrier issued a through bill of lading, which recited a freight rate of $51\frac{1}{2}$ cents per 100 lbs. on 2,235 pounds, the actual weight of the entire shipment; and, when the goods reached their destination, the consignee tendered to the terminal carrier the charges due on a computation at that rate, and demanded delivery. This demand was refused, but the company offered to deliver the goods on the payment of charges at the rate either of 99 cents per 100 lbs. actual weight, or of $51\frac{1}{2}$ cents per 100 lbs., estimating each of the six barrels at 420 lbs. and limiting the value of contents to 75 cents per gallon. The alternative rate so offered is the same specified in the southern freight classification and approved by the Interstate Commerce Commission for the territory of this shipment, and the refusal of the company to make delivery on other terms was based upon the idea that the Federal law imperatively required the enforcement of this

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rate, notwithstanding the specification of a different and lower rate in the bill of lading.

His tender and demand proving ineffectual, Horne resorted to this writ of replevin; and, in regular course of proceeding, he was adjudged entitled to the possession of the goods in question, the trial Judge being of the opinion that the rate named in the bill of lading was controlling, in the absence of evidence that the rate established by the rules of the Interstate Commerce Commission had been brought to the attention of the public "at the initial point of shipment."

The defendant prosecutes an appeal in error.

Ordinarily the rate of affreightment inserted in a bill of lading is binding on the parties and will be effectuated by the Courts as an agreed compensation for the service contemplated. It is the contractual standard for computing the price to be paid for the transportation and delivery of the goods; and the tender of that price by the consignee, as a general rule, entitles him to their immediate possession, and will warrant an action of replevin if they be not promptly surrendered. That rule controls the present case, unless the Federal law invoked by the company creates an exception within which it falls.

Section 6 of the Interstate Commerce Act of 1887 (Ch. 104, 24 Stat., 379), as amended in 1889 (Ch. 382, 25 Stat., 855), requires (1) that every common carrier engaged in interstate transportation

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shall furnish the Interstate Commerce Commission a copy of its schedule of rates, and thereafter print and publicly post it at each station upon its line; (2) that all connecting carriers engaged in interstate transportation on joint schedules of rates shall in like manner file a copy thereof with that Commission and thereafter make the same public when, where, and in such manner as the Commission may from time to time require; (3) that the rates, when so established, shall not be changed except upon prescribed notice. The tenth section of the Act imposes a large penalty for a violation of any of these provisions.

This legislation, having been passed by the Federal Congress with a view of regulating interstate commerce, undoubtedly supersedes and abrogates all conflicting State statutes and general laws (*Railway Co. v. Hefley*, 158 U. S., 99; *Southern Ry. Co. v. Harrison*, — Ala., —); and if applicable in this case, it is obviously controlling in the defendant's favor. Is it applicable under the facts disclosed in this record? Manifestly the Act is not self-executing as to the public. It imposes no obligations or restraints upon the public and in no way affects it, until after certain preliminary steps have been taken by the carrier or carriers. Shippers are not affected by the Act until the required publication of rates has been made, and to bring them within its operation in a given case, the burden is upon the carrier, or carriers,

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to show compliance with that condition precedent. If the contest be with respect to a shipment over a single line, the carrier, to have the benefit of the Act against its patron, must show publication at each of its stations; and if it be as to a transportation over connecting lines on joint account, they must show that they have made such publication as the Commission directed, or the Act will not be applied in their favor.

It was the latter burden that rested upon the defendant in this case, the transportation here involved having been made by connecting carriers jointly. The record contains no evidence of any publication, at any time or place, of the alternate rate on which the defendant relied in the Court below; nor, indeed, does it contain any evidence that the Commission ever directed that the same should be published at all. The latter omission might with plausibility be urged as an excuse for the former one—that is, the failure on the part of the plaintiff to prove that the Commission directed a publication of this rate, might with some reason be said to have relieved the defendant of the necessity of proving that publication had been made—if both facts were equally dependent upon affirmative proof for their establishment. Such is not true, however. The publication required by the Act is intended for the inspection, information, and advantage of the public (*Railway Co. v. Hefley*, 158 U. S., 101),

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and it is certainly contemplated that some publication shall be made in every instance, though the character and extent of publicity to be given by connecting carriers is left to the discretion and direction of the Commission. The Courts will presume, at least in the absence of proof to the contrary, that the Commission in the discharge of its duty, according to the manifest spirit and clear implication of the Act, directed some kind of publication to be made by these carriers when it set the seal of its approval upon their schedule of rates. This record affords no evidence that such direction was not given, hence the presumption that it was given is conclusive for the purposes of this litigation, and the defense of the company must fail because it did not prove compliance with that direction. This Court cannot say, as did the learned trial Judge, that the alternate rate urged by the company should have been published "at the initial point of shipment," for in the absence of the direction presumed to have been given, it cannot be known that publication at some other point or points in the route was not deemed sufficient and directed by the Commission.

Some publication is presumed to have been directed, but none is shown to have been made. This excludes the case from the operation of the Federal statute, and leaves the plaintiff with his

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rights under the bill of lading unimpaired and enforceable in this suit.

It may be that this company and its associates have subjected themselves to the penalty of that law. Whether they have or not, and it is not the province of this Court to decide, it is certain that they have failed to establish compliance with one of the preliminaries necessary to put it in operation as to the plaintiff. It may well be in force as to them in many of its requirements, and not as to him in any particular.

For the reasons stated, the judgment of the Court below is affirmed.

Duane & Co. v. Richardson.

DUANE & CO. v. RICHARDSON.

(*Knoxville*. November 17, 1900.)

1. APPEAL. *Maintainable without bill of exceptions.*

This Court will not dismiss an appeal in a law case on motion for want of bill of exceptions, but will hear and determine the case upon its merits, as presented by the record, without bill of exceptions. (*Post*, p. 81.)

2. ABATEMENT, PLEA IN. *Waived, when.*

By resisting the plaintiff's motion to transfer a case which has been returned before a Justice of the Peace of a wrong district to a Justice of the district in which the case is properly triable, the defendant waives his plea in abatement to the jurisdiction. (*Post*, pp. 82-84.)

Code construed: § 5933 (S.); § 4896 (M. & V.). § 4121 (T. & S.).

3. SAME. *Same.*

And it is error for the Circuit Judge to submit a plea in abatement to the Justice's jurisdiction to trial by a jury where no issue has been made upon it by the plaintiff, and the defendant has waived it in the Justice's Court. (*Post*, pp. 82-84.)

FROM CARTER.

Appeal in error from Circuit Court of Carter County. H. T. CAMPBELL, J.

Duane & Co. v. Richardson.

BOREN, FOLSOM & EDENS and TIPTON & MILLER for Duane & Co.

SIMERLY & ALLEN for Richardson.

WILKES, J. This is an action of replevin commenced before a Justice of the Peace. It comes to this Court by appeal of the plaintiffs from a judgment against them in favor of the defendants, dismissing their suit.

A motion is made in this Court to dismiss the appeal upon the ground that the cause was tried before the Court and a jury and oral evidence was introduced, and the jury was charged by the Court, but no bill of exceptions was made, as appears in the transcript setting out the evidence and charge.

This motion is not well made, and is overruled. A party may appeal from the decision of the Court below without making any bill of exceptions whatever. In such cases nothing that should be included in a bill of exceptions can be looked to in this Court, but the process, pleadings, minute entries, verdict and judgment are matters properly constituting a perfect record in the absence of a bill of exceptions, and can be reviewed though there may be no bill of exceptions made or filed or incorporated in the transcript. Caruthers' History of a Lawsuit, page 334, section 279.

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It appears from the transcript that the Justice's warrant was returned for trial in the civil district where the plaintiff resided, and not in the district where the defendant lived or the property was found. The defendant filed a plea in abatement alleging these facts, which was properly sworn to. Thereupon the plaintiffs, without replying to the plea, moved the Court to certify the papers in the cause for trial before some Justice of the Peace of the district where the defendant resided or where the property was found. This motion was resisted by the defendant, and thereupon the Justice considered the motion and plea at the same time, and overruled both and heard the case on the merits, and gave judgment for the plaintiffs for the property and costs.

The defendant thereupon appealed to the Circuit Court, where the case was submitted to a jury "upon the issues joined," as the record recites, and the jury returned a verdict that "they found the issue upon the plea in favor of the defendant and that the plea in abatement is good, and sustained the same."

There is no trial or verdict on the merits of the case, as appears from the record. The plaintiff moved the Court for new trial, upon the ground that it was error to submit the plea in abatement to the jury, and because the plea was waived by the motion of plaintiff to transfer the cause from the Justice to the proper district, and the

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objection made thereto by defendant, and because no issue was made up to be tried before a jury. This motion was held under advisement by the trial Judge, and at a subsequent term of the Court was overruled, and a judgment was pronounced against the plaintiff for costs, and his suit was dismissed. From this judgment there was an appeal to this Court.

We are of opinion there is error in the proceedings of the Court below.

The statute (Shannon, § 5933) provides that actions of replevin or suits commenced by attachment may be tried in any district in which any portion of the property is found. The trial Judge, it appears, was of opinion this statute was mandatory and not merely directory, and, the writ having been returned in the wrong district, the Justice of that district had no power to try the case, or to certify it to another Justice for trial. If he had been correct in this view he should simply have dismissed the suit, which is in substance what he did.

In this we think he was in error.

When the jurisdiction was questioned by the plea in abatement and the plaintiff, without replying thereto, moved to transfer the cause to another competent Justice, it should have been done. By objecting to the transfer the defendant waived his plea and objection to the jurisdiction,

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and submitted to trial before the Justice of the Peace before whom the return was made.

In the Circuit Court it was error to submit the plea to the jury. There was no issue upon it. The plaintiff, by not replying to it, had admitted the truth of the facts stated in it, and in that shape there was no question of fact involved, but only a question of law, and the motion to transfer having been made the case stood in proper shape for the trial Judge to pass upon and review the action of the Justice in hearing the cause, and in declining to transfer it to another Justice for trial.

The trial Judge should have ruled that the case was properly tried by the Justice of the Peace under its status before him, and should have proceeded in the Circuit Court to try the cause upon its merits without regard to the plea.

For this error the judgment of the Court below is reversed and the cause remanded for a new trial upon the merits.

The appellee will pay the costs of the appeal.

Sullivan County v. Ruth & Co.

SULLIVAN COUNTY v. RUTH & CO.

(*Knoxville*. November 7, 1900.)

1. COUNTY BRIDGE. *Power of commissioners.*

Bridge commissioners and their engineer, upon whom the County Court has imposed the duty of superintending the erection of a county bridge, in accordance with the terms of a written contract, with specifications, entered into between the county and the contractor, have no power under our statutes, either by direct act or indirectly by failure to object to defective execution of the work at the time, to waive or permit deviation from the provisions or requirements of the contract. Their sole power and duty is to see that the contract is faithfully executed. (*Post*, pp. 87-91.)

Code construed: §§ 1730, 1731, 1732 (S.); §§ 1448, 1449, 1450 (M. & V.); §§ 1266, 1267, 1268 (T. & S.).

Cases cited: *Hunter v. Campbell*, 7 Cold., 55; *Grant v. Lindsay*, 11 Heis., 667; *Railway v. Wilson*, 89 Tenn., 602.

2. PROXIMATE CAUSE. *What is.*

The flood, not defective construction, is the proximate cause of the destruction of a bridge, when it appears that the flood was of such extraordinary character that it would have swept away the bridge if no defect in its construction had existed, and that the bridge would have stood, notwithstanding the defect in its construction, but for the extraordinary character of the flood. (*Post*, pp. 91-95.)

3. BOND. *Escrow.*

Sureties are not bound who sign a bond on condition, that is made to appear on the face of the bond, that another person shall sign with them as surety thereon, although the bond is, without their knowledge or consent, delivered to the obligee and accepted by him without the signature of such additional security. (*Post*, pp. 95, 96.)

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4. CONTRACT. *Construction of.*

The term "limestone rock" is held synonymous with "solid rock" or "bed rock" when used in a contract with reference to the foundation of bridge piers, such being the manifest intention of the parties. (*Post*, p. 93.)

FROM SULLIVAN.

Appeal from Chancery Court of Sullivan County.
JESSE L. ROGERS, Sp. Ch.

C. A. BROWN and CURTIN & HAYNES for Sullivan County.

KIRKPATRICK, WILLIAMS & BOWMAN for Ruth & Co.

WILKES, J. This is an action for damages for the breach of a contract made by the defendants with the county of Sullivan to erect a bridge across the Holston river at Bluff City. The Chancellor was of opinion the defendants had substantially complied with the contract and were not liable for damages, and dismissed complainant's bill.

There was an appeal by the county, and on a hearing before the Court of Chancery Appeals that Court modified the decree of the Chancellor and gave judgment for an item of \$172, with interest from the filing of the bill in this cause, this being the cost of having the bridge piers grouted, which the defendants should have done

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but failed to do, and with the further sum of \$569, less the value of the stones for the fallen pier, which were used in rebuilding the same after it was thrown down, which item is specified as being two-thirds of the actual cost to complainant of rebuilding the pier, and the cause was remanded to the Chancery Court of Sullivan county for a reference to ascertain the facts and the value of the material, to be deducted from the \$569, with directions that the county should recover the balance and interest from the filing of the bill. The costs of this appeal and of the Court below were equally divided between the complainants and the defendants. Both parties have appealed to this Court and assigned errors.

It appears that the County Court of Sullivan County appointed a committee, consisting of the Road Commissioner and two others, to have the bridge built, and empowered them to employ an engineer. The committee let the stone work to Ruth & Co., entering into a written contract with them, with specifications. The contracts were reported to the Court and by it approved. The contract and specifications required the contractors to do and perform the work as specified in it, and in conformity with the instructions which shall be given from time to time by the engineer in charge for the county, the work to be paid for when completed agreeably to the specifications and to the satisfaction of the engineer.

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The Court of Chancery Appeals report that the specifications were not complied with in that the excavation for the foundation course of the middle pier was not carried down to solid or bed rock at the upper end of the pier by a depth of eight inches on one side, increasing to eighteen inches on the other and for several feet of the length of the foundation, the average being twelve or thirteen inches; that there were pockets or seams in the bed rock that had not been excavated, and as a consequence the pier was laid in a bed of sand and small water-worn stones and gravel; that no cement was used in building the foundation course of said pier, and none of the projecting stones had been removed to make a level surface for that course, but broken stones and sprawls had been used to level the same, and that no cement was used in the backing or body of the foundation. The Court further reports that these defects or failures to follow and observe the specifications were known to Lockhart, the engineer in charge of the work; that his attention was called to the defects in the foundation before any stones were laid thereon, and that he approved building upon it as it was, and approved the laying of the foundation piers as they were laid, and that he was with the committee frequently at the work and inspecting the same, and that the manner in which the piers were built must have been known to him and to

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the committee; that after it was completed it was inspected by the committee and approved, and on their report was by the county received and paid for in full. That Court further reports that while the work was not done in strict compliance with the specifications in the particulars mentioned, there was no fraud or concealment on the part of the contractors, but that the County Court had no knowledge of the defects and failure to carry out the specifications until after the pier was washed down, such as may be imputed to it from the knowledge of the engineer and committee of construction.

Upon the facts as thus stated the Court of Chancery Appeals was of opinion that the provisions of the Act of 1835, being Sections 1730, 1731, 1732 of Shannon's Code, fixing the rights and duties of the contractors, and that the Act of 1859-60 (Shannon, § 1738) did not apply exclusively, the latter relating to the repair of bridges, while the former related to the erection of new bridges. The Court was of opinion that under Sections 1730, 1732 the engineers and commissioners must have the contract executed strictly according to the specifications, and had no power to waive any of their requirements or deviate from their provisions, and hence the contractors could not be protected in their deviations from the specifications by the directions of the engineer and the acquiescence of the committee. We

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are of opinion that Court is correct in its view of the statutes applicable in this case, to wit, Sections 1730, 1731, 1732 of Shannon's compilation being Section 3 of the Acts of 1835. The provisions of these statutes relate to proceedings to build bridges and causeways at the expense of the county, and are to be distinguished from Sections 1721 to 1729, which are Sections 1 and 2 of the same Act, which relate to private enterprises of more or less public convenience. *Hunter v. Campbell County*, 7 Cold., 55; *Grant v. Lindsay*, 11 Heis., 667; *Railway Co. v. Wilson*, 5 Pick., 602.

It is not meant to hold that Section 1738, Shannon's compilation, is not also applicable, as the repair of bridges may very properly be held to embrace the erection of a new one on the site of an old one which has become defective, but the question remains whether under either Act the committee appointed to have the bridge erected can in any way deviate from the specifications laid down in the contract. It will be observed that the contract bound defendants to perform the work in accordance with the contract, and, also, in accordance with the instructions to be given from time to time by the engineer in charge. Evidently some duty was intended to be imposed on the engineer and committee in the execution of the contract and performance of the work. But we do not find that any discretion is

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given them to alter or change the details which had been incorporated into the contract and made part of it. The language is that the contractor was to execute the contract under the instructions of the engineer and committee. This provision was for a twofold purpose. (1) If there was any question raised as to the requirements of the contract and how it was to be executed, the engineer and committee were to instruct the contractor; and (2) they were to see that the contract was executed according to the specifications. But the language carries no warrant of power to the engineer and committee to change or alter the contract or to waive any of its requirements, and certainly not in any feature or to any extent that would lessen the stability or efficiency of the work.

The Court of Chancery Appeals reports that it is not true that the defective work was the prime, efficient and proximate cause of the destruction of the pier, and the destruction of the bridge placed on it, but that by reason of said defective work the pier was less able to withstand the impact of an unusual flood tide in the river, which bore down on it an unusual quantity of drift, and that if the work had been constructed in accordance with the terms of the contract, it would probably have not been able to resist the violence of the flood and the impact of heavy driftwood, timber, and the trunks of

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trees which were thrown against it by the flood, and that the proximate cause of the destruction of said middle pier and the consequent destruction of the superstructure of the bridge, was the unusual and violent flood and the driving thereby of timber, driftwood and the trunk of a tree against the pier, but that the action of the water and driftwood were materially aided by the weakness of the pier, caused by its failure to come up to specifications.

The bridge was finished and accepted February 21, 1897, and was washed away and destroyed March 23, 1897. The freshet which destroyed the pier was one almost unprecedented, and as we construe the finding of the Court of Chancery Appeals, the bridge would not probably have withstood it, if it had been constructed according to contract, but it was not so strong and secure as it would have been if constructed according to contract. We are of opinion it was beyond the power and authority of the engineer and committee to waive any requirement of the contract which would make the bridge less secure than if built according to specifications, and that their authority only extended to superintending the construction according to contract, and they had no power to allow the stability of the structure to be lessened, and this was known to the contractors. It is probable that the Court might have delegated to the engineer and committee the de-

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tails of the construction altogether, but it did not do so, but fixed certain details themselves, and incorporated them into a contract which was executed by the county and contractors and this could not be varied, altered, or waived to the prejudice of the county by the engineer and committee. We think the Court of Chancery Appeals was not in error in holding that the term "limestone rock," used in the contract, should be held to be synonymous with "solid rock," or bed rock. It was certainly not the spirit or intention of the parties that the foundation of the pier should rest upon loose rock, even though it might be limestone, and the clear intent was that it should be so solid as to render the foundation secure, and this requirement being vital to the efficiency of the bridge could not be waived by the engineer and committee. The Court of Chancery Appeals find as a fact that it was a part of the contract that the piers were to be grouted, and this was not done as to the other piers until after the destruction of the middle pier, and then at a cost to the county of \$172. Some criticism is made of the use of the term "grouting," and it is insisted that it was not required by the contract, but this criticism we think not well made, and the terms "grouting" and "being laid flush with mortar" may well be treated as the same. After all it was essential that the "filling in" should be held to its place by mortar

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or grouting, and this was not done by the contractors, but was done by the county at a cost of \$172, in order to preserve and strengthen the other piers, and this item, we think, is allowable, and there need be no reference to ascertain the amount.

The Court declined to charge the defendants with the cost of replacing the superstructure, and limited the recovery to the replacing of the pier which was washed away, and the grouting of those which remained, and this is made the basis of an assignment of error on the part of the county.

This damage the Court of Chancery Appeals treat as consequential, and arising out of two contributing causes, to wit, the weakness of the pier and the violence of the flood. The doctrine of contributing causes may be stated, generally, that where two or more causes concur, and it cannot be determined which contributed most largely, or whether without their concurrence the accident would have happened, a recovery cannot be had. *Marble v. Worcester*, 4 Gray, 395.

The wrongful act of the defendant must be the efficient cause of the injury, without which the injury would not have occurred, and the influence of the wrongful act should predominate over all other supervening causes. *Brown v. Wabash Railroad*, 20 Mo. Appeals, 222 (S. C., 5 L. R. A., 787).

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If an intervening cause is sufficient of itself to cause the misfortune, the former cause must be considered too remote. *Seal v. Gulf Railroad Co.*, 65 Texas, 274 (S. C., 12 L. R. A., 283, and note).

So when an injury has been occasioned by one of two causes for only one of which defendant is responsible, the plaintiff must show that the damage was produced by that cause. *Searles v. Manhattan Railroad Co.*, 101 N. Y., 661 (S. C., 7 L. R. A., 131, note).

Under these rules the defendant should not be liable for the damage to the superstructure. But for the unprecedented flood this misfortune would not have occurred. But the defect in the pier would have existed if the flood had never come, and defendant would have been responsible even if it had not been swept away. Its destruction was simply the revealing of a state of affairs which would have made the defendant liable for the defects, even though no actual consequential injury had occurred.

The defendants, when they undertook the contract, were required to execute a bond for the sum of \$4,000 to faithfully comply with it. The Court of Chancery Appeals finds that the bond was never, as a matter of fact and law, executed; that it was signed by two sureties and placed in the hands of one of the makers, Jenkins, to be signed by the other surety, Sells, but it was

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never in fact signed by him, and was held in escrow by Jenkins for that purpose, the other sureties stipulating that they were to be bound only on condition the bond was also signed by Sells. While the bond was being thus held, and before it was signed by Sells, it was taken by Thomas, one of the committee, and carried before the County Court, and by it accepted in ignorance of the fact that it was incomplete and the signatures were to be binding only on condition. The fact that it was carried before and presented to the County Court was not known to the parties who had signed it. The bond on its face showed that it was to be signed by Sells, and a blank space was left for his signature, while his name was inserted in the body of the bond. Under the circumstances the bond never took effect, or had any force, and no recovery can be had as against the sureties upon it.

The result is that the decree of the Court of Chancery Appeals is affirmed.

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POINDEXTER v. RAWLINGS.

(Knoxville. November 21, 1900.)

1. **VENDOR AND VENDEE.** *Vendor's lien saved from bar of statute by renewal or new promise, when.*

The renewal of a purchase-money note given for a conveyance of lands, or a new promise before expiry of limitations, will preserve the vendor's lien, and prevent operation of the statute of limitations against it as to the vendee in possession, from the maturity of the renewal or date of the new promise. (*Post*, pp. 101, 102.)

Cases cited: *Sheratz v. Nicodemus*, 7 Yer., 8; *Thompson v. Thompson*, 3 Lea, 126; *Hughes v. Brown*, 88 Tenn., 594; *Fisher v. Fisher*, 9 Bax., 71.

2. **ESTOPPEL.** *By surrender of joint deed to husband and wife and taking one to wife.*

Where a husband, joint grantee with his wife, returned a deed to the grantor, and requested the execution of a new one to the wife, which was done, and the wife took possession and claimed title thereunder, though such transaction passed no additional interest to the wife, it precluded the husband from asserting his joint interest as against her, and hence he had no interest in the land which the grantor could subject to his vendor's lien. (*Post*, pp. 102-104.)

Case cited: *Howell v. Hoffman*, 3 Head, 563.

3. **SAME.** *Same.*

Such transaction also estopped the wife to assert any ownership under the original deed. (*Post*, p. 104.)

4. **SAME.** *Same.*

Though the second deed, for lack of title in the vendor, passed no title, it worked an estoppel against all the parties to the transaction. (*Post*, pp. 102-104.)

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5. DEED. *Color of title.*

As it purported to convey the fee, the second deed was a good color of title on which to base adverse possession. (*Post*, p. 104.)

6. VENDOR'S LIEN. *Possession held in subordination to.*

As the wife paid nothing for the land, and knew that her husband owed for it, the vendor's lien for the unpaid price followed the land into her hands, and her possession was in subordination thereto until the maturity of the purchase-money notes, at which time limitations began to run against it, as it would have done against the real vendee. (*Post*, pp. 103-105.)

7. SAME. *Not saved from bar of wife's possession by husband's renewals and new promises.*

Renewals and new promises by the husband as to the notes, to which she was not a party, would not prevent limitations running against the vendor's lien on the land in her possession. (*Post*, pp. 105, 106.)

8. SAME. *Same.*

That the husband was the agent of the wife in procuring the second deed, or that she accepted it knowing the land was subject to the vendor's lien, did not imply that she became bound to so hold it for all time, but the implication is that her holding was to be subordinate to the lien only until the purchase money notes matured and suit would lie to enforce the lien, which presumption is not overcome by the fact that her husband made renewals and new promises, they being without her knowledge. (*Post*, pp. 106, 107.)

9. SAME. *Statute of limitations begins to run against, when.*

Limitations barring a vendor's lien begin to run from the maturity of the purchase money obligations, and not from the conveyance. (*Post*, pp. 107, 108.)

FROM SEVIER.

Appeal from Chancery Court of Sevier County.
Jno. P. SMITH, Ch.

Poindexter v. Rawlings.

HUFFMASTER & CHESNUTT for Poindexter.

J. R. PENLAND for Rawlings.

CALDWELL, J. This is a bill to collect balance of purchase money for land, and to enforce the vendor's equity.

In 1883 the complainant, Martha A. Poindexter, sold and conveyed a tract of land in Sevier County to the defendants, A. P. Rawlings and his wife, Mary S. Rawlings, for the consideration of \$2,500; one-half thereof being paid in cash, and the other half being covered by three notes of A. P. Rawlings, maturing in 1885, 1886, and 1887, respectively. Upon the maturity and payment of the first note, in 1885, A. P. Rawlings returned the original deed to the vendor, and she, at his request, executed another deed in its stead, conveying the land to his wife, Mary S. Rawlings, alone. This deed, like the former one, merely recited a consideration of \$2,500 "in money and notes," and made no express reservation of a lien. The second and third notes were renewed from time to time by A. P. Rawlings, and when this bill was filed in August, 1899, he still owed on them an aggregate of more than \$1,100.

On the foregoing facts the complainant sought to collect the balance of purchase money due her by an enforcement of her vendor's equity in the land.

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A. P. Rawlings pleaded the statute of limitations of six years in bar of a recovery on the older of the two renewals, and, with his wife, also pleaded the statute of seven years in bar of the vendor's equity in the land.

The Chancellor and the Court of Chancery Appeals successively overruled the former plea and sustained the latter one; and then pronounced a decree against A. P. Rawlings, personally, for the whole balance of unpaid purchase money, but refused a sale of the land, upon the ground that the vendor's equity therein was barred before the filing of the bill.

The complainant has appealed from so much of the decree of the latter tribunal as denied her a sale of the land for her debt; and A. P. Rawlings from that part overruling his plea of the statute of limitations as to the older renewal.

It appears from an inspection of the older of the two renewal notes that it was a few months more than six years past due when the bill was filed, and, consequently, that, in the absence of other proof, the complainant's action thereon was barred by the six years statute. But the Court of Chancery Appeals found, as a fact from other proof in the record, that A. P. Rawlings had within that period promised to pay that note. That finding is conclusive; and the new promise, being distinct and definite, arrested the running of the statute, saved the action from its bar, and

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justified the recovery on that note. There is no question as to the correctness of the recovery on the other note.

What effect, if any, did the renewals and new promise have on the operation of the seven years statute against the vendor's equity in the land?

It has long been settled in this State that the vendor's equity will be barred by the vendee's continuous possession of the land under an absolute deed for a period of seven years after the maturity of the debt. *Sheratz v. Nicodemus*, 7 Yer., 8; *Thompson v. Thompson*, 3 Lea, 126; *Hughes v. Brown*, 88 Tenn., 594.

In the intermediate case of *Fisher v. Fisher*, 9 Bax., 71, it was said that the vendor's equity was extinguished by the bar of the debt in six years.

Whether the renewal of a purchase money note, or a new promise within six years after maturity, will also prolong the life of the vendor's equity and put the statute in operation against it only from the maturity of the renewal, or the date of the new promise, has not been decided, except, possibly, by implication of an affirmative nature in the concluding portion of the opinion in the Thompson case just cited. We are fully persuaded, however, that it will produce that result as to the vendee in possession, and now so rule. The vendee's possession is presumably in subordination to the vendor's equity, whenever lia-

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bility for unpaid purchase money is so acknowledged and extended, and, as a consequence, the period of limitation cannot rightfully be computed back of that time, because the statute never runs in favor of a subordinate holding. The continued acknowledgment of the debt by formal renewal or distinct and definite promise, is from its nature, unless qualified, likewise a continuing recognition of the vendor's equity. It is a matter of conscience and legal duty that the vendee pay for the land he buys; hence, so long as the possession is coupled with renewed confessions of liability for purchase money, his holding will be regarded as in harmony with the vendor's equity, and not in antagonism to it, unless he make some affirmative expression to the latter effect.

It follows, therefore, that the renewals and new promises by A. P. Rawlings, being made without qualification or reservation against the vendor's equity, had the effect not only of extending his legal responsibility for the notes, but also of prolonging the life of that equity, of arresting and postponing the operation of both statutes so far as he was concerned; and that the complainant's right to enforce her equity against any interest he might then have in the land was not barred, but available at the time she filed her bill.

His interest, under the deed of 1883, was that of tenant by the entirety with his wife, the conveyance being to them jointly, and the complain-

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ant now has the right to subject that interest to sale for the payment of her debt, unless it should appear that it subsequently passed out of him, or was waived in such manner as to defeat her equity in it.

He has never in fact conveyed his interest to any one; nor was the return to the vendor of her deed to him and his wife efficacious in law to divest them of their title and revest it in the vendor. *Howell v. Hoffman*, 3 Head, 563.

The complainant therefore had no title to impart when she executed the deed to Mrs. Rawlings in 1885, and of course Mrs. Rawlings acquired no title as such thereby. Nevertheless the surrender of the first deed by A. P. Rawlings to the vendor, and her execution of the second one in its stead to his wife by his request, and her claim and possession thereunder, preclude him in equity from now claiming any interest in the land as against his wife, and the same facts likewise preclude the complainant from now asserting that A. P. Rawlings has any interest under the first deed to which her vendor's equity can attach. As against his wife he no longer has an interest in the land as vendee, and the complainant for that reason can have no relief against the land as his property.

How, then, if at all, did the renewals and new promises by A. P. Rawlings affect the vendor's equity in the land as the exclusive property of

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his wife? The Court is relieved of the necessity of considering their influence upon the equity in her original interest as joint vendee with her husband under the first deed, for the facts that have just been held to exclude all idea of present ownership in him under that instrument are equally potent in disproving such ownership in her. For the purpose of this litigation at least, her present ownership must be regarded as having arisen under the second deed alone. Though that instrument, for lack of title in the vendor at that time, passed no title to Mrs. Rawlings, it nevertheless worked an estoppel on all the parties to the transaction; and as it purported to convey the fee, it was also good color of title upon which to base adverse possession. However, as she accepted that deed without paying for the land herself, and with ample knowledge that her husband then owed the two immature purchase money notes, the vendor's equity for those notes undoubtedly followed the land into her hands, and her possession in its inception was, as that of the real vendee, in subordination to that equity until the notes matured. This is true whether she be regarded as a subvendee with notice (*Sherratz v. Nicodemus*, 7 Yer., 8; 2 Story's Eq. Jur., Sec. 1217), or as a mere volunteer (*Robinson v. Owens*, 103 Tenn., 48), which she really was; and it is equally true that the seven years statute began its operation in her favor and against

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the vendor's equity in the first instance, as it would have done as to the real vendee, not when she received her deed and took possession in 1885, but as to the equity for one note when it matured in 1886, and as to the equity for the other note when it matured in 1887. Therefore, the possession that Mrs. Rawlings acquired and held for herself alone under her deed, from the time of its execution in 1885 to the filing of the bill in 1899, thirteen years and twelve years respectively after the maturity of the original notes, was effective under the seven years statute, not only to extinguish all interest of her husband as joint vendee under the first deed, but also for the extinguishment of the vendor's equity that followed the land into her hands, unless her husband's renewals and new promises arrested the statute and kept the equity alive against her, as they would have done against him if he had owned the land when they were made.

Obviously the mere renewals and new promises, as such, and without more, were not productive of such result, she not being a party to them. She could not be deprived of the ordinary legal consequences of her possession by the independent and individual act of her husband, nor prejudiced in her separate rights without some act of her own. Participation on her part in the extension of the notes, or her assent to it, would doubtless have given the same extension to the vendor's

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equity; but the burden of showing such participation or assent was upon the vendor. No such fact was shown. Indeed, the record fails to show that Mrs. Rawlings was in any way even cognizant that the renewals and new promises were made. It results that she is not affected by them, and that the period of limitation in her favor must be computed from the maturity of the original notes. When that is done, it appears that the statute had more than completed its full course against the separate equity of each of these notes at the time the bill was brought, and consequently that the complainant then had no right to have the land sold for the satisfaction of the unpaid purchase money.

It is contended in behalf of the complainant that A. P. Rawlings was the agent of his wife in surrendering the first deed and procuring the second one, and that statements then made by him to the effect that the land would thereafter remain bound for the unpaid purchase money as in the first instance, were binding upon her as his principal, and, hence, that she should not now be heard to deny the existence of the vendor's equity.

The most that can be made of the facts thus contended for, is that Mrs. Rawlings took the land in 1885 subject to the vendor's equity. The Court has no doubt, and has already ruled, that she did so take it. The contention does not em-

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brace the further proposition that her husband, after that time, or when the renewals and new promises were made, undertook as her agent to extend the life of the vendor's equity; and if it did, there is no proof of the fact. That Mrs. Rawlings knowingly took the land at the outset subject to an equity in favor of the complainant for unpaid purchase money, does not imply that she thereby became bound to so hold it for all time. On the contrary, the implication is that her holding was to be subordinate to that equity only so long as the notes then outstanding remained immature, until suit might be brought to collect them and enforce the equity; and to rebut that implication it was incumbent on the complainant to show additionally some act or course of conduct on the part of Mrs. Rawlings sufficient to make an extension of the equity beyond its original scope of time. Renewals of the notes and new promises by her husband without her knowledge, though he may have acted as her agent in the first instance, are not sufficient for that purpose.

Though it pronounced a correct decree upon the facts of the case, the Court of Chancery Appeals was in error when it said, in its opinion on the law, that the mere execution of a deed and delivery of possession thereunder establish an adversary relation between the parties as to unpaid purchase money, and that "from that day the

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statute of limitations of seven years begins to run in favor of the vendee against the vendor." In reality, as has been seen, the possession of the vendee does not become adverse, and the statute does not begin to run against the vendor's equity, until the maturity of the purchase money debt, until the vendor has a matured right of action for his debt, and for the enforcement of his equity. It was so decided in the cases cited on that subject in a former part of this opinion.

Let the decree be affirmed.

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SULLY v. CHILDRESS.

(Knoxville. November 21, 1900.)

1. **BILLS AND NOTES.** *Makers of, become sureties, when.*

The relation of the makers of a note is that of sureties to one who has assumed its payment for them, and likewise to one who, after such assumption and with knowledge of it, takes an assignment of the debt. (*Post*, pp. 110, 111.)

2. **SAME.** *Release of sureties by extension of time for payment.*

The sureties on a note are not released by reason of the creditor's agreement with the principal maker to extend the time of its payment for a fixed and definite period beyond maturity, without their consent, made upon consideration of payment of part of the note at or after it became due, although the payment, made pursuant to such contract, may have been made to the creditor's agent for collection and credited on the note before its maturity. (*Post*, pp. 112-115.)

Cases cited: *Bank v. Matson*, 99 Tenn., 394; *Foy & Dulaney v. Sinclair*, 93 Tenn., 298; *Howell v. Sevier*, 1 Lea, 360; *Wilson v. Langford*, 5 Hum., 320; *White v. Summers*, 1 Bax., 154; *Bank v. Shook*, 100 Tenn., 436; *McKamey v. McNabb*, 97 Tenn., 237.

3. **LIMITATIONS, STATUTE OF.** *Absences from State must be pleaded.*

If the plaintiff proposes to rely upon the defendant's absence from the State to defeat the plea and bar of the statute of limitations, he must plead the fact more specifically than to aver that his cause of action, "while apparently barred by the statute of limitations, is not in fact barred, but in full force." (*Post*, pp. 115-120.)

Cases cited and approved: *Cross v. Disney*, 95 Tenn., 595; *Whaley v. Catlett*, 103 Tenn., 348.

Cited and overruled: *Criner v. Cherry*, 3 Shann. Cas., 496.

4. **SUPREME COURT.** *Remand for amendment of pleadings, when.*

This Court will remand a cause for amendment of pleadings when it appears that a party has followed and been misled in

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making up the issues by a reported opinion of this Court which the Court deems it proper to overrule. (*Post*, p. 120.)

FROM WASHINGTON.

Appeal from Chancery Court of Washington County. JOHN P. SMITH, Ch.

KIRKPATRICK, WILLIAMS & BOWMAN for Sully.

ISAAC HARR for Childress.

McALISTER, J. This bill was filed to collect balance due on a note for \$750 executed by defendants, B. F. Childress and J. H. Preas, to the Carnegie Land Co., and by the latter company indorsed to Alfred Sully, the present complainant. This note was part of the consideration to be paid by Childress and Preas for four lots purchased by them from the Carnegie Land Co., for the sum of \$3,000. Two deeds were executed and a lien retained by the company for the balance of purchase money.

It appears that at the time Preas and Childress received these deeds from the land company they had negotiated a sale of the lots to one Selden Langley at a profit of \$1,000, which was paid in cash. Langley also made, it appears, the cash payments to the land company due from

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Preas and Childress, and Langley also assumed payment of deferred purchase notes.

It further appears that Preas and Childress executed a deed to Langley for the four lots, in which they retained a lien for their own indemnity.

Langley, it appears, failed to pay one of the notes executed by Preas and Childress to the Carnegie Land Co., and thereupon this bill was filed for its collection.

As already stated, the suit is brought by Alfred Sully, to whom the Carnegie Land Co. indorsed the note. Suit as to Preas was dismissed.

The defendant, Childress, resisted the collection of the note upon two grounds—first, that he was released by an extension granted to Langley, and, second, because the note sued on is barred by the statute of limitations of six years.

The note on its face appears to have been executed by Jas. H. Preas and B. F. Childress, as makers, to the Carnegie Land Co. Upon the back of the note appears the following indorsement, viz.: "I assume and agree to pay the within note. Selden Langley." Again: "Pay to the order of Alfred Sully. Carnegie Land Co., by J. T. Wilder; Prest."

The Court of Chancery Appeals properly held, upon the facts and the law, that, as between all parties concerned, Langley was principal on the debt sued on, and Preas and Childress were sure-

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ties. *Union Life Ins. Co. v. Hanford*, 143 U. S.

When the note in suit matured, December, 1890, it was owned by Alfred Sully. He also owned the other note of \$750, maturing at the same time. On the 17th of March, 1891, Langley mailed his check for \$1,200 to the Citizens' Bank of Johnson City, where the notes were deposited for collection. The bank applied \$795 of this sum to take up one of the \$750 notes, with interest thereon, and applied the balance of \$405 on the note now in controversy, which left a balance of \$390 and interest due on the latter note. It should be remarked that the \$405 credit is dated March 19, 1891, one day prior to the maturity of the note.

The insistence made in the Court below and here was that Childress was released as surety on said note, for the reason there was a contract between Sully, the holder, and Langley, the principal, for an extension of 90 days, in consideration of the cash payment of \$1,200 on the two notes, and that this contract was made and the credit paid before the maturity of the note.

It is well settled that if the creditor grant an extension of the time of payment upon a valid consideration, for a definite and fixed period, to the principal debtor, to the prejudice of the surety and without his consent, it will operate to release the surety from his liability. *Bank v. Matson*, 15 Pick., 394; *Foy & Dulaney v. Sin-*

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clair, 9 Pickle. It is also well settled that the agreement between the creditor and principal debtor which will discharge the surety must be a valid and binding agreement, and one which presents a legal obstacle for the time to the prosecution of an action upon the original security. *Howell v. Sevier*, 1 Lea, 360; 5 Hum., 320. But where the principal in a note after maturity contracts with his creditor for delay without the knowledge of the sureties by paying part of the indebtedness as a credit, the contract is without consideration and will not bind the creditor or discharge the sureties. The promise by the party of payment is only part performance of his previous existent obligation. He does nothing more than he was already bound to do, and the party receiving the money or promise receives nothing in addition to what he was already entitled to receive under his contract. Such an agreement would interpose no obstacle in law to the enforcement of the original contract. *White et al. v. Summers et al.*, 1 Bax., 154; *Olmstead v. Latterman*, 150 N. Y., 315 (43 L. R. A., 685). A partial payment, however, made on a note before its maturity, is a good consideration for an agreement to extend the time for payment of the balance, and consequently discharges the surety. 24 Am. & Eng. Enc. of Law, 829, citing authorities. See, also, *Bank v. Shook*, 16 Pickle, 436. But in *McKamey v. McNabb*, 13

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Pick., 237, it was said that payment of a portion of a debt before the expiration of the three days of grace did not amount to a valid consideration to support an agreement for delay. It was held this defense was too technical and without any real merit.

The Court of Chancery Appeals, after an elaborate citation and discussion of the testimony, find as a fact that both parties had in mind the payment of the note at maturity, and not before maturity. The possibility of the money being paid at the bank and applied before maturity (the day before) was not considered by either party. Here was, in substance, an understanding, as we infer from the facts, that at maturity a certain sum would be paid upon the debt, and the balance extended for 90 days. As a matter of fact, this sum was paid to an agent of the holder of the note at a distant place one day before maturity. That Court found that, while the bank in which the notes were deposited for collection had the right to receive and apply the money, it was not authorized to make any contract that would release the sureties, and that it would be a harsh application of the rule to say that a contract for delay under such circumstances amounted to an agreement for delay upon a binding consideration.

We concur with that Court in holding that a payment made by the bank the day before the maturity of the note, when the contract of the

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holder and principal was that the payment should be made at maturity, would not release the sureties.

The next assignment of error is that the Court of Chancery Appeals should have held the note in suit barred by the statute of limitations. A more specific statement of this assignment of error is, viz.:

“This suit was brought August 3, 1898. The note was due and payable March 20, 1891. More than six years had, therefore, elapsed from the time the right of action had accrued on the note to the time suit was brought, and the Tennessee statute had completed the bar. This defense was made by answer and plea. Complainant introduced proof to the effect that defendant, Childress, was absent from the State of Tennessee a part of the time, and that for this reason the statute did not apply. Defendant, however, insists that absence from the State is not alleged in the bill, and there being no issue on this question, the proof is irrelevant. The bill is remarkable for its brevity. It alleges that complainant, as indorsee, sues the defendants as the makers of the note, exhibit ‘A’ to the bill. Said note, after demand, is unpaid, except to extent shown by credits indorsed. Said note, while apparently barred by the statute of limitations, is not, in fact, barred, but in full force.”

It will be observed that there is no allegation

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of fact in the bill to bring the suit within any saving clause of the statute of limitations, but the pleader contents himself with a statement of a conclusion of law—namely, that the note is in full force. We are constrained to hold this pleading insufficient to have authorized the introduction of proof by complainant that defendant, Childress, was in fact absent from the State about one-third of the time the statute was running. The Court of Chancery Appeals, in taking a contrary view, were governed by the case of *Criner v. Cherry*, 3 Shannon's Tenn. Cases, 496. The bill in that case was filed by the creditors of Robert Long, deceased, against his administrators and heirs at law, in the Chancery Court of McNairy County. It was alleged that insolvency of the estate had been suggested by the administrator at the March term, 1867, of the County Court; that the personal assets had been exhausted in the payment of debts, and that intestate owned certain lands which it was sought to subject to the payment of debts. The answer contested the claims of complainant on the ground that they were barred by the statute of limitations of two and a half and six years.

The point relied on by complainant in proof to save the bar of the statute was the fact that the Court of McNairy County had been closed for four years during the war. The Court, in a petition to rehear, used this language: "The sav-

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ing of the bar of the statute might have been established by any evidence sufficient for the purpose, whether denied or not by the answer. The bill charges the existing indebtedness; the answer denies it, and relies on the statute of limitations. The years of the statute had passed, but defendants or complainants might by evidence show any fact or law which would tend to support his claim, and complainant may show his claim not barred, whether it be that the statute was suspended by the closing of the Courts or by having filed his claim in Court, or suit brought therein in due time."

The case of *Criner v. Cherry* was decided in 1875, and, so far we are advised, it was reported for the first time in 3 Shannon's Cases, 496, published in 1899, and has not been cited in any subsequent case on the point now in issue. It is not supported by any authority, and is wholly irreconcilable with recent decisions of this Court.

This exact question arose in *Pratt v. Vattier*, 9 Peters, 405. Mr. Justice Story, who delivered the opinion of the Court, said, viz.: "In regard to the statute of limitations, it is clear that the full time has elapsed to give effect to that bar upon the known analogy adopted by Courts of Equity in regard to trusts of real estate, unless Bartle is within one of the exceptions of the statute by his nonresidence and absence from the State. It is said there is complete proof in the

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cause to establish such nonresidence and absence. But the difficulty is, the nonresidence and absence are not charged in the bill, and, of course, are not denied or put in issue by the answer, and unless they they are so put in issue the Court can take no notice of the proofs; for the proofs, to be admissible, must be founded upon some allegations in the bill and answer. . . . And the doctrine is now clearly established that, if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill or specially reply it, or, what is the modern practice, amend his bill." See also Gibson's Suits in Chancery, page 336; Hick's Manual of Chancery Practice, page 142.

This rule of pleading was recognized and applied in the case of *Cross v. Disney*, 11 Pickle, 595. The Court said: "In the first place, the averment of the bill by which it was complainant's evident purpose to avoid the anticipated plea of the bar of the statute, by setting up a disability which would entitle her to its saving clause, falls far short of the requirement of correct pleading. It will be seen that complainant fails to state that she was a *feme covert* at the time the adverse holding of the defendant began, and that this condition of coverture continued until this suit began, or to a point of time within the saving of the statute. We think it may be taken

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as a well established rule of practice that when the statute of limitations is relied on at law or in equity, and the plaintiff desires to bring himself within its saving, it is proper for him to set forth the facts specially. . . . And the party thus seeking to avoid the effect of the statute by disability must not only aver that it existed when the cause of action accrued, but he must allege in his pleadings a continuance of it to a point of time when it would be a perfect answer to the bar."

So, in the case of *Whalcy v. Catlett*, 19 Pickle, 348, it is held that where the plaintiff seeks to avoid the effect of the statute of limitations on the ground of concealment of defendant, the fraudulent action must be properly alleged. The Court said, viz.: "The statement in the declaration is that defendant fraudulently concealed from the plaintiff and the public the wrongful, willful, and malicious act. If this bill be held sufficient to charge the concealment of the cause of action, and not merely the evidence of the defendant's connection therewith, still it is fatally defective, in that it does not show that the cause of action was discovered within one year next before the action was brought. The declaration clearly implies that it has been discovered, but does not disclose when. In order to take the case out of the statute, it must be alleged and shown that

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the cause of action was concealed to a time within one year next before the suit was brought, and discovered within the year."

These cases announce the correct rule of pleading, and must govern the determination of the present case.

The case of *Criner v. Cherry*, 3 Shannon's Cases, 496, to the extent it holds that a suspension of the statute of limitations may be shown by proof, without direct issue made by the pleadings, is not authority, and is overruled.

It follows that the decree of the Court of Chancery Appeals, as well as that of the Chancellor, in favor of the complainant, adjudging liability against the defendant on the note in suit, are both erroneous, and the same are reversed. But, inasmuch as complainant had a right to rely on the authority of *Criner v. Cherry* in formulating his pleadings, and has been misled thereby to his prejudice, the Court is of opinion this is a proper case for remandment for an amendment of the bill. It is, accordingly, so ordered, but complainant will pay all costs of this Court and of the Court below.

Moses v. Groner.

MOSES v. GRONER.

(*Knoxville*. November 24, 1900.)

HOMESTEAD. *Exists in several unimproved lots situated in separate blocks, when.*

The head of a family who is owner of four unimproved town lots, worth less than \$1,000, situated in as many separate, but contiguous, blocks, separated by streets, is entitled to claim them all as homestead, it appearing that one lot could be used for dwelling and outhouses and the other three as truck patches.

FROM KNOX.

Appeal from Chancery Court of Knox County.
H. B. LINDSAY, Ch.

SANSOM, WEICKER & PARKER for Moses.

TEMPLETON & CATES for Groner.

McALISTER, J. This record presents a question of allotment of homestead. The specific question is, whether complainants are entitled to homestead in four unimproved lots in what is known as Mayfield's Addition to Knoxville. The four lots mentioned are not contiguous, but are separated

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by streets—imaginary streets laid off on the plan—and each of said lots is situated in a separate block. It further appeared that said four lots are worth less than \$1,000. The Clerk and Master reported that said lots are not so situated that any two or more of them can be used as one lot for the purpose of a home, but they are so situated that a house and barn could be built on one lot, leaving considerable ground on said lot, and that the other lots could be used as truck patches in connection with the house lot.

The Court of Chancery Appeals held that the contiguity of the lots so that they could be embraced in one inclosure was not necessary to make them subject to the homestead right. This holding is in accord with our adjudicated cases. In *Smith & Wife v. Carter Bros.* it appeared that Smith owned a lot in the town of Falcon, on which he lived with his family, and held title bond to another lot across the street, on which there was a lien for purchase money. The Court held that if the two lots were worth less than \$1,000, complainant had a clear right to homestead in both lots.

In *Bank v. Meacham*, we held that the head of a family may have a homestead in so much of a tract of land lying apart from the one on which he resides, but used in connection therewith, as is necessary, together with the residence lot, to make up the value of \$1,000. It appeared, in

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that case, that the two tracts of land did not adjoin each other, but were apart at least a quarter of a mile.

These authorities, we think, are conclusive of this question, and the decree is affirmed.

 Brumit v. Railroad.

106	124
110	466

106	124
117	228

BRUMIT v. RAILROAD.

(Knoxville. November 24, 1900.)

1. RAILROADS. *Construction of, upon street not abatable as a nuisance, when.*

The construction and necessary excavation by a steam railway company of its main and side tracks along and upon a public street, when done by permission of the owner of the fee in the street, who has likewise the right to use or authorize the use of the street for street railway, gas, electric light, and other like purposes, does not, *per se*, constitute a nuisance that will be abated or restrained at the suit of lot owners abutting on the street who have no interest in the fee in the street, but only an easement of ingress and egress. (*Post*, pp. 138, 139.)

2. SAME. *Same.*

The construction and operation of a steam railroad along and upon a public street will not be abated or restrained as a public nuisance in any case at the suit of an abutting lot owner, unless he can show that he suffers therefrom some special and particular injury distinct from that suffered by other abutting proprietors on the street. (*Post*, p. 138.)

Case cited: *Lowery v. Petree*, 8 Lea, 674.

3. SAME. *Damages recoverable against, for impairment of abutting lot owners' right of ingress and egress in street.*

A steam railway company that constructs and operates its road upon a public street by permission of the owner of the fee in the street, is liable to the owners of abutting lots who possess only an easement of ingress and egress, for impairment of that easement by excavation and by blocking the street with its cars, or by excessive switching. (*Post*, pp. 139, 140.)

Cases cited: *Railroad v. Bingham*, 87 Tenn., 522; *Harmon v. Railroad*, 87 Tenn., 614; *Smith v. Railroad*, 87 Tenn., 626.

4. DEED. *Bounded on street.*

The owner of a lot abutting on a public street has not title, but only an easement of ingress and egress, in the street, when

Brumit v. Railroad.

his deed calls for the side of the street, and *a fortiori* where his vendor expressly excepts the street from the operation of the deed. (*Post*, pp. 134-137.)

5. SAME. *Vendee's rights determined from terms and face of deed.*

A vendee's rights are determined from the terms and face of his deed, and cannot be enlarged by reservations contained in his vendor's dedication of adjoining property for a public street. (*Post*, pp. 137, 138.)

FROM CARTER.

Appeal from Chancery Court of Carter County.
JOHN P. SMITH, Ch.

SIMERLY & ALLEN for Brumit.

TIPTON & MILLER, BOREN, FOLSOM & EDENS
and CURTIN & HAYNES for Railroad.

McALISTER, J. The object of this bill is to enjoin the defendant, a railroad corporation chartered under the laws of Virginia, but doing business in the State of Tennessee, from excavating and laying a switch track along Pine street, in the town of Elizabethton, Carter County, on which street complainant is an abutting proprietor, and to recover damages for the obstruction of the street by the work in progress, and upon final hearing that the Court will order the removal of the track already laid before the service of the

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injunction. The preliminary injunction granted by the Chancellor was dissolved upon the coming in of the answer so as to permit the defendant company to complete the work upon executing a bond in the sum of \$2,000 to indemnify complainant against any injuries to his property that may be occasioned by said work. The bond was accordingly executed, and the work on the switch and side track was completed by the company at a cost of several thousand dollars. A large volume of testimony was taken, and on the final hearing the Chancellor granted the relief sought and ordered the defendant company to tear up and remove the side track so constructed.

On appeal, the decree of the Chancellor was affirmed by the Court of Chancery Appeals. The cause is again before this Court on the appeal of the defendant company. The principal assignment of error is that the Court of Chancery Appeals erred in holding that the side track in controversy was built on Pine street without any authority of law, and that, so far as complainant's rights are concerned, said track is a nuisance and must be torn up and removed.

The material facts found by the Court of Chancery Appeals in its original and supplemental opinions are substantially as follows:

The town of Elizabethton, in Carter County, is unincorporated. Hence there was no consent of the town to lay down the track, nor was there

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any authority conferred by the County Court. In 1892, what is known in the record as the Co-operative Town Co., chartered under the laws of this State and owning a large body of land adjoining Elizabethton, laid out said land as an addition to the town. It divided its land into lots, streets and alleys, with designated names, and had the division platted by its engineer, and the plat or map thus made was recorded in the Register's office of Carter County, with the following dedication of the streets to the public, viz.:

"Know all men by these presents, that the Co-operative Town Co. of Tennessee does hereby dedicate to the public, for use as public highways, all the streets and alleys shown and designated on the plat hereto annexed, being Plat No. 1 of the part of said company's lands in Carter County, Tennessee; but the said company hereby excepts and reserves out of this dedication the fee simple title to all the land covered by or embraced in said streets and alleys, and all other rights and titles not herein expressly dedicated, and said company further reserves to itself the right to use and to authorize the use of all streets, alleys, commons and other public places for the location and operation of street railways, for water pipes and mains, for gas pipes, mains and posts, and for electric wires, poles and other structures for illuminating and other purposes."

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This plat, with the above dedication attached, was duly recorded May 21, 1892.

Pine street, along which the company's side track has been laid, is one of the streets laid out in this plat. It is fifty feet wide, about 2,000 feet in length, and its course is nearly north and south, crossing and intersecting several other streets and alleys laid off on said map. Pine street has several residences, including that of plaintiff, and one storehouse fronting on it.

On the — day of —, 1894, the Co-operative Town Co. sold to one J. F. Nance lots 55, 56, 57 and 58 in Block 25, fronting on Pine street about one hundred feet. Nance erected on his lot a comfortable two-story house, fronting on Pine street. The deed from the Town Co. to Nance contained this reservation, to-wit: "Reserving and excepting out of this conveyance, however, all streets, alleys and other highways indicated on said plat, and the fee simple title to the lands conveyed thereby." On the 26th of February, 1896, complainant Brumit purchased from Nance the above lots, including the residence thereon, and the Court of Chancery Appeals finds that Brumit purchased said lots subject to the reservation contained in the deed from the Town Co. to Nance. That Court further finds that Brumit's deed only called for the side of the street, and that he has no interest in the fee of the street.

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The Court of Chancery Appeals further finds that, prior to complainant's purchase from Nance, and on the 23d of June, 1894, the Co-operative Town Co., for a consideration, conveyed to the Bristol, Elizabethton & North Carolina R. R., a corporation in this State, and whose rights and franchises were afterwards acquired by the defendant company, the right to put down a track of its railroad over and along Pine street, from Broad street, as is shown on its map, to its intersection with the East Tennessee & Western North Carolina R. R., a distance of 1,500 or 1,600 feet. Accordingly, the B., E. & N. C. R. R. built a single track of its road along the center of Pine street for the distance stated. The construction of this road on Pine street is not involved in this suit, but the present controversy is in respect to the right of defendant company to build a side or switch track on Pine street between the road already built and the sidewalk of complainant, covering the entire length of Pine street.

The Court of Chancery Appeals further finds that on the 24th of July, 1894, the Co-operative Town Co. made a deed of conveyance to the defendant railway company or its successors to build two standard gauge railroad tracks along and through the center of Pine street, as platted on the map and registered, and that said conveyance was duly recorded. That Court also found that,

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in addition to the deed executed to the railroad company on the 24th of July, 1894, there was another deed made by the successors of the Town Co., namely, the Watauga Land Co., to the defendant, for the consideration of \$2,000, in which it authorized said company to build a side track on Pine street to connect with the narrow gauge railroad already mentioned.

That Court further finds that the Watauga Land Co. became the successor of the Town Co. and the owner of all its property. Complainant purchased one of his lots, No. 50 in Block 25, from the Watauga Land Co., and at the date of this purchase the B., E. & N. C. R. R. had already constructed its single track in the center of Pine street, in front of complainant's property. It has already been stated that this single track was on Pine street when complainant purchased the other lots, including his residence, from Nance.

It should also be remarked that when complainant Brumit purchased all of his lots, two conveyances were of record from the Town Co. and the Watauga Land Co., respectively, to the defendant, granting it, for a consideration, the right to build a side track on Pine street to connect with the narrow gauge railroad, originally owned by the East Tennessee & Western N. C. R. R.

The Court of Chancery Appeals also found that in the case of *Tipton v. Wright*, to enforce a vendor's lien against the Co-operative Town Co.

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on the lands in question, an agreed decree was entered on the 24th of April, 1894, reciting "that a right of way may be, and the same is hereby, released to said Co-operative Town Co. over that part of the lands beginning at the intersection of Broad street, thence through and along Pine street to the narrow gauge railroad. The said right of way released from the vendor's lien is for one standard gauge railroad."

It appears that the B., E. & N. C. R. R. had been built from Bristol to Elizabethton in 1893, and in order to make terminal connections with the narrow gauge—the East Tennessee & Western North Carolina R. R.—it was necessary to obtain a right of way over the lands of the Town Co., and the effect of the foregoing agreed decree was to enable the Town Co. to grant the privilege. Soon after said decree was entered, the Town Co. executed a deed to the railroad company—the B., E. & N. C. R. R.—for a right of way over Pine street so as to connect with the narrow gauge—E. T. & W. N. C. R. R. The defendant company, as already stated, is the successor of the B., E. & N. C. R. R., having purchased all its property and franchises.

The Court of Chancery Appeals found that, in November, 1899, defendant company commenced to construct the side track along Pine street, about parallel with the previous track in front of complainant's property, claiming the right to do so

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under a license granted it by the Watauga Land Co. It further finds that defendant company, in constructing its switch, was proceeding to excavate the street, on a level with the bed of its original track, out to the edge of the four-foot sidewalk in front of complainant's property; that it proposed to excavate and level the other side of the street in the same way, and that the work as thus completed left the sidewalk in front of complainant's property and the front of his lot practically on a perpendicular embankment, from thirty inches to three feet above the street level. It also left, says that Court, a street way of only nine or ten feet in width between the track of the company and the sidewalk in front of complainant's lot. The present bill, it is stated, was filed about the time the excavating process reached complainant's property.

It was also found by the Court of Chancery Appeals that the single track laid in the center of Pine street was used as a switch track to connect with the narrow gauge railroad, and that the additional side track put down was intended as a switch track, to be used for switching purposes in handling the business of the company.

The Court of Chancery Appeals also finds that, after the dissolution of the injunction herein, defendant company placed dirt and macadam on the sides of the street, leveling them up, as a general thing, with the tops of its cross-ties under

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its rails. The tracks on Pine street are used from an hour and a half to two hours or more daily, in switching cars over these tracks. During this time, all the witnesses say, the street cannot be safely used with vehicles, and complainant cannot approach the front of his house with a horse and vehicle with safety. Cars are often left on the tracks for hours and over night and on Sundays. Below the property of complainant about a hundred yards, the defendant company has practically used all the street with its switch tracks, and, as a general thing, the street is blocked at this point with its cars.

Upon these facts, the Court of Chancery Appeals held, as matter of law, that the defendant company had constructed its side track along Pine street without any legal right or authority, and that complainant's easement on said street as an abutting proprietor was so injuriously affected as to entitle him to maintain a bill in his private capacity to restrain said construction. That Court adjudged said side track a nuisance, and ordered it torn up and removed, as already stated.

The Court of Chancery Appeals, in its learned opinion, cites a large number of cases from sister States in support of its conclusions. We have not had access to the authorities cited, nor have we deemed it necessary to consult them, for the reason we are thoroughly satisfied every question

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arising upon the record has been definitely settled by the decisions of this Court.

The first matters to be clearly understood are the respective rights of the complainant as an abutting proprietor, and the defendant company as a commercial railway on Pine street. It must be admitted that complainant, Brumit, has no interest in the fee of the street, since his deed only calls for its sides, and, moreover, as we have seen, his grantors expressly reserved the fee. It is said in *Smith v. Street Railroad*, 3 Pickle, 632, viz.: "It is well settled that a steam railway is a burden not ordinarily contemplated in the dedication or condemnation of land for a public street, and, as a consequence, that the original owner, in whom the ultimate fee resides, may recover compensation for the subjection of the fee to such new and independent use. An abutting lot owner, such as plaintiff is shown to be, without more than an easement of way and not owning the ultimate fee in the soil, certainly enjoys all that reason entitles her to claim and all that the law will allow, when she has the free and unobstructed use of the street for all purposes of ingress and egress. For such purposes she may use the whole street, or so much of it as may be necessary, but in doing so she cannot have the exclusive use for herself at all times, nor can she recover damages for the use of it by others, unless such

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use be excessive or incompatible with her rights as already defined. To entitle her to claim damages, she must sustain some private or particular injury; something must be done which injures her access to her lot on the street before she can sue successfully. Inconvenience or annoyance which she suffers in common with the public gives no right of action," citing authorities. In that case it appeared that the street railroad was lawfully upon the street, in accordance with a lawful contract with the city authorities, as required by its charter. So it was held that it was liable in damages to the plaintiff only for the unlawful use and operation of its road, and that any use that may be excessive or amount to a nuisance will be unlawful, and give the plaintiff a right of action. It was further held that for such unlawful acts, if done, the law allows successive actions.

So in the case of *Railroad v. Bingham*, 3 Pickle, 522, which was an action by an abutting lot owner to recover damages against a steam railroad for the occupation of the street in front of her property. Plaintiff claimed, first, damages consequent upon the lawful and necessary use of a public street for railroad purposes; second, damages consequent upon the grading of the street by the railroad company; third, damages by obstruction of her right of ingress and egress by lawful occupation and use of street by railroad company;

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fourth, damages resulting from excessive and unnecessary and unlawful use of the street in front of her premises, and amounting to a nuisance. The Court, construing Mrs. Bingham's deed, held that her property was confined to the side of the street, and that she owned no part of the fee in the street. No part of her property having been taken or occupied by the railroad company, her damages must be limited to such injuries as she can show herself to have sustained as the owner of a mere easement in the street in front of her premises. The Court held in that case the railroad was not a trespasser upon the street, but was there by lawful authority. Further, that the sound and well-settled rule is that no action will lie by an abutting lot owner who does not own the fee in the street, for injuries which merely result from the legal and reasonable use of a public street by a railroad company, and which leaves his right of ingress and egress reasonably sufficient, citing cases. The company would be liable for any impairment of plaintiff's easement of ingress and egress on the street. So it was held that an abutting lot owner who does not own the fee in the street may recover of a railroad company operating its cars by legal authority such damages as may result from an unlawful, excessive, or improper use of the street, as, for instance, for leaving its cars standing,

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unreasonably parking its cars, etc. See, also, *Harmon v. Railroad*, 3 Pickle, 614.

As we have already seen, the deed from the Town Co. to Nance expressly reserved and excepted out of that conveyance "all streets, alleys, and other highways indicated on said plat, and the fee simple title to the lands conveyed thereby." Complainant, Brumit, purchased the property in question from Nance, subject to said reservation. In addition to this, Brumit's deed only called for the side of Pine street, which, as matter of law, excluded any interest in the fee of the street. So that it is perfectly clear that complainant is in no attitude to complain that the side track proposed would be an additional servitude upon the fee of said street. But the Court of Chancery Appeals was of opinion that the reservation in the deed to Nance was only intended to conform to the plat and deed of dedication of the Co-operative Town Co., and that if the reservation in the Nance deed was broader than the registered reservation in the plat, it would be inoperative, because the rights of abutting lot owners purchasing on the faith of the dedication were fixed, etc. But we think this an erroneous view. Complainant, as a purchaser of abutting lots, must be bound by the provisions of his own deed, or that of Nance under which he held, and that deed expressly excluded any interest whatever in the fee of the streets. Moreover,

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we are of opinion that the registered dedication and plat reserve to the Town Co. "the fee simple title to all the land covered by or embraced in said streets and alleys," for this is the express language of the dedication. The dedication then proceeds, viz.: "And said company further reserves to itself the right to use and to authorize the use of all streets, alleys, and commons, and other public places for the location and operation of street railways, for water pipes and mains, for gas pipes, mains, and posts, and for electric wires, poles, and other structures for illuminating and other purposes." There can be no doubt that, under the dedication, as well as the provisions of complainant's deed, all interest in the fee of the streets was expressly excluded, and, this being so, complainant cannot be heard to make the question that the construction of the side track on Pine street is an additional servitude upon the fee. Nor can complainant proceed upon the idea that said side track is a nuisance, and ask its abatement, without showing some especial or particular injury suffered by him, distinct from other abutting proprietors on that street. *Lowery v. Petree*, 8 Lea, 674; *Perkins v. Ross*, 42 S. W. R., 61; 6 Am. Rep., 332; *Garnett v. R. R. Co.*, 25 Am. & Eng. Enc. R. R. Cases, 226; 20 Am. & Eng. Enc. R. R. Cases, 25; 73 Fed. Rep., 696.

But, in our opinion, it cannot be successfully

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maintained that the defendant company is a trespasser on said street, and that the construction of said side track is a public nuisance. The defendant company acquired a right to occupy said street, under conveyances from the Co-operative Town Co. and its successor, the Watauga Land Co., which corporations owned the fee of said street and the lots adjoining. The deed from the Town Co. to the Railroad Co., made in 1894, granting to it the right to build two standard gauge tracks on Pine street, was registered two years before complainant, Brumit, purchased his lots, in 1896. One of the tracks had already been built, and was being used, when complainant purchased. These conveyances exclude altogether the idea that defendant company was a trespasser on said street, or that the construction of said side track was a nuisance *per se*.

So that, in its last analysis, the only question for determination upon this record is, whether or not complainant's easement in the street has been impaired by the construction of the side track, and whether the operation of cars thereon has been excessive. Complainant would be entitled to damages for such injuries, whether the defendant company is lawfully or unlawfully upon the street, and although the abutting lot owner does not own the fee in the street. *Bingham v. Railroad*, 3 Pickle, 522.

If the defendant company creates a nuisance

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by blocking the street with cars, or by excessive switching, thus impairing complainant's easement of ingress and egress, he is entitled to have such a nuisance abated and, incidentally, to damages for such injuries.

In *Harmon v. Railroad*, 3 Pickle, 614, it was held that if a railway company, lawfully located upon a street in a city under its charter and by permission of the local government, uses the street in the operation of its road beyond what is necessary for the proper running of its trains, and by such excessive and improper use substantially destroys the easement of way and ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance, recovering the damages that have accrued up to the time that each action was brought, etc. *Railroad v. Bingham*, 3 Pickle, 522; *Smith v. Railroad*, 3 Pickle, 626.

Complainant is entitled to an order of reference to assess his damages for the impairment or destruction of his easement of ingress and egress appurtenant to the street, and also to damages for the excessive use of the street caused by parking cars thereon, blocking the street, etc. But complainant is not entitled to a decree to tear up and remove the track, and the decree of the Court of Chancery Appeals so holding is erroneous, and the same is reversed. The costs of the appeal will be paid by the defendant company.

Gernt v. Cusack.

GERNT v. CUSACK.

(Knoxville. November 24, 1900.)

1. CHANCERY PLEADING AND PRACTICE. *Averment of fraud, how made.*

It is not sufficient, in a bill to set aside a contract, to aver fraud in general terms, and *a fortiori*, to omit the averment altogether, but the particular facts constituting the fraud must be set out. (*Post*, pp. 149, 150.)

Cases cited: *Raht v. Mining Co.*, 5 Lea, 1; *Neal v. Smith*, 1 Lea, 371; *Shepherd v. Shepherd*, 12 Heis., 276.

2. SAME. *Both allegations and proof are essential.*

Allegations without proof, or proof without allegations, can never be the foundation of a decree. (*Post*, p. 150.)

Cases cited: *King v. Rowan*, 10 Heis., 675; *Furman v. North*, 4 Bax., 296; *Robertson v. Wilburn*, 1 Lea, 633; *Randolph v. Bank*, 9 Lea, 63; *McKelden v. Gouldy*, 91 Tenn., 677; *Bradshaw v. VanValkenberg*, 97 Tenn., 316; *Bank v. Carpenter*, 97 Tenn., 437.

3. SAME. *Case in judgment.*

The complainants seek to recover of C. the proceeds of certain oil leases, which they aver were received by C. as partner of complainants upon a sale (made under an option secured by one of complainants), and fraudulently transferred by C. to his wife. The answer denied the entire case made by the bill, and C.'s wife set up title in herself, averring that the sale of the oil leases was made, and the proceeds received by her, under an option secured by herself after the expiration of complainants' option. The proof sustained the answer.

Held: Complainants are not entitled to any relief, regardless of

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the good or bad faith of the transaction. The pleadings make no attack upon or claim under the wife's option. (*Post.* pp. 150, 151).

FROM FENTRESS.

Appeal from Chancery Court of Fentress County.
T. J. FISHER, Ch.

O. C. CONATSER, JOHN H. McMILLAN, JOUROL-
MON, WELCKER & HUDSON for Gernt.

SMITH & SMITH, J. A. ALLARD, C. E. SNOD-
GRASS, ROBINSON, SMITH & LANSDEN, YOUNG
BROS., W. T. MURRAY and WASHBURN, PICKLE
& TURNER for Cusack.

BEARD, J. The original bill in this cause avers that, on February 11, 1896, complainant, Bruno Gernt, secured from Hanckey & Cole an option on their interests in certain oil leases in lands in Overton, Pickett and Fentress Counties, at the price of \$10,000, and that, relying upon the ability of his co-complainant, Fry, and of the defendant, James Cusack, to aid him materially in disposing of this option at a profit, on that day he entered into a written contract with them, in which, after reciting this option, and that it terminated "February last, 1896," it was stipulated that, in consideration of each of the contracting

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parties devoting his efforts to a sale of this property, that the profits arising therefrom should be divided between them as follows: One-half to Gernt, and one-fourth each to Cusack and Fry. It is further averred that, as the result of their joint efforts, a sale of this interest to Percy and Filer, for the consideration of \$30,000, was effected on the 15th of April, 1896, and that the whole of the purchase money had been paid; that one Collins assisted in making the sale, and of the profits derived therefrom Gernt had received only the sum of \$1,000, and Fry nothing, while Cusack had received \$8,500, which he had fraudulently delivered to his wife, with a view to defeat the respective claims of the complainants, and this money was then on deposit in the Bank of Livingston. The bill then charged that "the said James Cusack is indebted to complainant, Bruno Gernt, in the sum of \$3,750, and to complainant, A. J. Fry, in the sum of \$2,375 on account of the profits and commissions received from the sale of the oil lands and leases" described, and complainants prayed a decree against him for these sums and in the meantime for an attachment to be levied on all the funds in the hands of the Bank of Livingston standing to the credit of either James Cusack or his wife, M. G. Cusack, to be held for the satisfaction in whole or in part, as might be, of the decree thus sought. The Bank of Livingston was called on to

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answer as garnishee as to the amount of funds so held. Thereafter an amended bill was filed, in which, after repeating the averments of the original bill, it is alleged that the option of Gernt from Hanckey and Cole was obtained on January 1, 1896, and ran for thirty days, and that it had been extended and was in full force and effect when "complainants and defendant, James Cusack, sold the leases to Percy and Filler; that the contract between the complainants and said Cusack, of February 11, 1896, was also in full operation at the time of said sale," and that, having received \$8,500 of the compensation for making the sale, Cusack and wife had entered into a conspiracy to defraud complainants of their shares in said sum of money, and, in furtherance thereof, had deposited it to the credit of Mrs. Cusack. Other averments are made in this amended bill, but it is unnecessary to set them out. As in the original bill, so in the amended bill it is prayed that the transfer of the \$8,500 by her husband to Mrs. Cusack be set aside for fraud, and that complainants be given a decree for the sums respectively due them, and that the same be paid out of the fund attached. There is also a prayer for general relief.

Cusack and wife answered the original and amended bills, and Mrs. Cusack filed her answer as a cross bill. In their answer they admit that Hanckey and Cole owned the oil leases and in-

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terest mentioned in the bill; that Gernt, prior to February 11, 1896, obtained an option to sell the same, and that complainants and James Cusack entered into the agreement or contract set out in the original bill, but they deny that this agreement existed longer than the power to sell which occasioned it. In other words, they insist that it terminated with the option, and that this latter expired the last of February, 1896, and thereafter it was not effective and operative between the parties, and James Cusack avers that, if the option was renewed, he was no party to the renewal. Mrs. Cusack also denies that the option to Gernt was renewed, or, if it was, that she had any knowledge of it, and she avers that, through her agent, Collins, she obtained an option from Hanckey and Cole, and that, under her option, she, through her agent, sold the interest of said Hanckey and Cole to Percy and Filer for \$30,000. Mrs. Cusack and her husband, in short, deny the whole predicate of the bill and amended bill upon which relief is sought. Her contention, and that of her husband, as stated in the answer and cross bill, is that, April 2, 1896, after the option to Gernt had expired, dealing for herself and independently of her husband and with her own means, as she had been doing for years, and as she had the right to do, she obtained, through her agent, Collins, an option on these oil properties from Hanckey and Cole, to

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run for thirty days, with a privilege of extension for fifteen days, upon certain conditions, for \$12,000, and that within the time of her option she sold the properties to Percy and Filer for \$30,000. It also averred that the \$1,000 received by Gernt was wrongfully received by him from her agent, Collins, and that this \$1,000 was paid to him to prevent him from intermeddling with her business and defeating the trade she, through her agent, Collins, was negotiating with Percy and Filer. In her cross bill, Mrs. Cusack seeks for a decree against Gernt for this sum thus, as is alleged, wrongfully obtained by him from her agent.

Gernt answered this cross bill, and denied that Mrs. Cusack made the sale to Percy and Filer, or that he injected himself into her business transaction or that he made any false statements to her or her agent, and again avers that the sale was made under his option and by virtue of the contract between himself, Fry, and James Cusack. He admits the receipt of \$1,000, but alleges that this was only a part of his share of the profit upon his option.

Thus it will be seen the issue made upon these pleadings was, Was the sale to Percy and Filer, made under the Bruno Gernt option, in which Gernt, Fry, and James Cusack were interested, or under the Collins option, of which Mrs. Cusack was owner? On this issue the Court of Chancery

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Appeals reports as follows: "It will not be seriously contended that these properties were in fact sold under the Gernt option, for Gernt himself recognized the option sold by Hanckey and Cole to Collins, and went to Bowling Green, O., with Percy and Filer, to aid them in effecting a purchase from Collins under the option of the latter." Again, in a supplemental opinion, it is stated that "the sale to Percy and Filer was not, as a matter of fact, made under the option . . . to Gernt, but was in fact made under the option to Collins for the benefit of Mrs. Cusack."

Thus it will be seen the theory presented by the complainants in their pleadings as that upon which they were entitled to recover was distinctly found against them, and the contention of Mrs. Cusack, as presented in her answer and cross bill, as distinctly found in her favor. The issue being one purely of fact, it would seem to follow that the suit of complainants would be dismissed. To prevent this result, the complainants invoked certain equitable privileges, the statement of which we take from the opinion of the Court of Chancery Appeals, as follows:

"The mode of avoiding this result on the part of the complainants is by an array of evidence, direct and inferential, which, it is insisted, shows that James Cusack and wife, by fraud and collusion, secured the Collins option to defeat the rights of complainants under the Gernt option, and

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that James Cusack, being a partner under the Gernt option, his fraud, connived at and participated in by the wife, nullified the Collins option, and operated, by virtue of equitable principles, to bring the profits of the sale that was made under the provision of the Gernt option.

“Tersely stated,” continues that Court, “the proposition in this connection is that Gernt, although he thought that his option was gone, and he assented to the Collins option, and, so thinking, aided in effecting the sale under the Collins option, nevertheless, in the view of a Court of Equity, he effected the sale under his own option, because of the fraudulent procurement of the Collins option by Cusack and wife for their own benefit.”

This view was adopted by that Court, and hence a decree against the Cusacks in favor of the complainants for their respective shares in the sum of \$8,500 received by Mrs. Cusack from the proceeds of the sale.

Thus it will be seen the effect of this holding is to set aside and annul the Collins option as a fraud on the rights of the complainants, while neither the original nor amended bill makes any reference to this option, and both fail to charge fraud in obtaining it or in making sale under it, the only charge of fraud being as to the disposition of the proceeds of sale under the Gernt option when received by James Cusack. On the

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other hand, the answer of the Cusacks sets up the Collins option, claims the sale was made thereunder, and avers the *bona fides* of the transaction throughout.

We think there are two rules of equity practice which were overlooked in this decree, either of which requires its reversal:

1. It is well settled that when a bill seeks to set aside a contract upon a charge of fraud, it is not sufficient to make such charge in general terms, but it should point out and state the particular acts of fraud. *Raht v. Mining Co.*, 5 Lea, 1; *Neal v. Smith*, 1 Lea, 371; *Shepherd v. Shepherd*, 12 Heis., 276.

In *Raht v. Mining Co.*, *supra*, the Court says: "It is certainly true the answer abounds in allegations of fraud and overreaching on the part of Raht, and makes a positive statement to the effect that the resolutions of the board, admitting the indebtedness of \$84,711.71 and creating the lien relied on in the original bill, was obtained by the fraudulent suppression and misrepresentation of important facts; but these allegations are too general and indefinite to allow proof to be introduced to sustain them or otherwise to command the attention and interposition of a Court of Equity." Then, *a fortiori*, such a Court should refuse its interference when complainants rest their right to recovery upon fraud, failing, however, to allege it even in general terms.

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But it is said by counsel of the complainants that, without regard to pleading, the whole case was opened up in the evidence, and the Court of Chancery Appeals, yielding to this insistence, adopted the theory that Mrs. Cusack had colluded with her husband to obtain the fruit of the Gernt option, and was, therefore, bound in equity to account to complainants. This leads us to the other of the rules referred to, to wit:

2. "Allegations without proof, or proof without allegations, can never be the foundation of a decree." *King v. Rowan*, 10 Heis., 675; *Furman v. North*, 4 Bax., 296; *Robertson v. Wilburn*, 1 Lea, 633; *Randolph v. Bank*, 9 Lea, 63; *McKelden v. Gouldy*, 91 Tenn., 677; *Bradshaw v. Van Valkenberg*, 97 Tenn., 316; *Bank v. Carpenter*, 97 Tenn., 437.

But it is sought to avoid these two rules of equity practice by treating the bill as a bill to wind up a partnership and have an accounting between the partners. The difficulty, however, in the way of complainants in this respect is that Mrs. Cusack was not a member of this partnership. Her claims rest on an independent contract, which she alleges was made on her own credit and effected through her personal agent. This being so, upon what authority can it be maintained, giving the bill the interpretation now insisted on, that a Court of Equity can nullify Mrs. Cusack's purchase under the Collins option

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and treat it as being made under the Gernt option? This can only be done by first finding that she was guilty of a fraudulent combination with her husband to defeat his partners, and then by converting her into a constructive trustee for them. Such a remarkable result cannot be reached without proper pleadings.

The principle insisted upon by counsel of complainants that "if a stranger collusively join with a partner in a rival undertaking, the profits of the collusive or rival undertaking become partnership assets" is sound and well supported by authority. 1 White & Tudor's Leading Cases in Equity, 62; 2 Lindley on Part., 495; Story on Partnership, Secs. 174-5. But this principle cannot be successfully invoked here, because there is no averment in the original or amended bill, nor admission in the answer of the Cusacks, to warrant its application.

These considerations, without more, are sufficient to dispose of this case. It is, however, not improper to say that it is by no means certain from the finding of facts by the Court of Chancery Appeals that the merits of this controversy, even could they be reached by us, would be found to afford sufficient basis for a decree in favor of the complainants.

However this may be, at least upon the points of pleading already considered, we are satisfied that complainants' bill must be dismissed, and it

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is so ordered. The cross bill of Mrs. Cusack is also dismissed. All the costs of the cause, save such as pertain to the cross bill, will be paid by complainants and their sureties. A decree will go against Mrs. Cusack and her sureties for the costs of the cross bill.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1900.

LUMBER Co. v. LIEBERMAN.

(Nashville. December 15, 1900.)

- 1. CHANCERY PLEADING AND PRACTICE.** *Plea to jurisdiction allowed after setting aside pro confesso.*

Neither decree *pro confesso* nor entry of appearance to move to set it aside, debars or waives defendant's right, after such decree is set aside, to plead in abatement that he was not served with process. (*Post*, pp. 155, 156.)

- 2. CORPORATIONS.** *Service of process on agent insufficient, when.*

The Courts of a county in which a domestic corporation has no office or agency, or resident agent, cannot acquire jurisdiction of the company, over its objection by plea in abatement, when

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process was served on a traveling agent of the company who was temporarily in the county transacting its business. (*Post*, pp. 156-158.)

Code construed: § 4542 (S.); § 3539 (M. & V.); §§ 2834, 2834a (T. & S.).

Case cited: *Railroad v. Walker*, 9 Lea, 481.

FROM FENTRESS.

Appeal from Chancery Court of Fentress County.
T. J. FISHER, Ch.

SMITH & SMITH and D. L. LANSDEN for Lumber Co.

CONATSER & CASE for Lieberman.

WILKES, J. This is a bill filed by a domestic corporation in Fentress County against the defendants, who are residents of Davidson County, to recover \$3,658.34 alleged to be due from the defendants for lumber sold to them in Fentress County. Subpoena to answer was served upon A. F. Brasswell, who, it is alleged, was the agent of the firm in Fentress County. Brasswell as an individual was also made a defendant to the bill. Process was executed returnable to the April term of the Court, but there having been no term of the Court held in April, a *pro confesso* was taken against the defendants at the May rules.

On the twenty-third of May the individual members

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of the firm made affidavit for the purpose of having the *pro confesso* set aside, and in it stated that they had prepared to defend the suit, and that they file with the affidavit a sworn answer to the bill, and it was asked that the *pro confesso* be set aside and they be allowed to file their answer; but no answer as a matter of fact was filed.

The Chancellor set aside the *pro confesso*, and in his order setting it aside stated that the defendants asked leave to defend by filing a plea in abatement tendered with the motion, but that if the Court should be of opinion the plea in abatement could not be considered, then they ask leave to file the answer presented therewith, and be allowed to defend thereunder.

The order allowed the *pro confesso* to be set aside, and granted leave to the defendants to make such defense as they might deem proper. They thereupon filed a plea in abatement, properly sworn to, in which they stated, in substance, that they were a partnership doing business in Nashville, Davidson County, Tennessee, and were residents of that county when the bill was filed, and that complainant was a resident of Fentress County; that they had, when the bill was filed, no office or agency or resident agent in Fentress County, where it was filed; that process had never been served upon them, and they asked that the suit be abated.

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There was a motion to strike out the plea because (1) defendants had permitted a *pro confesso* to be taken, and thereby submitted to the jurisdiction of the Court. (2) They had entered their appearance to make the motion, and thereby submitted to the jurisdiction; that the plea was insufficient in form and substance, in that it did not allege that the firm had no agent in Fentress County, nor any office in that county when service of process was made.

The defendants were allowed to amend their plea so as to allege that they had no office in Fentress County, and the motion to strike out was overruled, and the complainant was required to join issue on the plea, to which he excepted.

Evidence of the defendant, Brasswell, was heard, and upon it the Chancellor sustained the plea in abatement and dismissed the bill, to which complainant excepted, and it thereupon prayed an appeal, which was granted.

The Court of Chancery Appeals was of opinion that the Chancellor committed no error in setting aside the *pro confesso* and permitting the plea in abatement to be filed to the jurisdiction; that the entry of appearance was simply for the purpose of contesting the jurisdiction, and not for a trial on its merits, and was not a submission to the jurisdiction, and in this we think that Court was correct.

That Court was also of the opinion that the

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Court below acquired no jurisdiction of the defendants, Lieberman, Loveman & O'Brien, by service of subpoena upon defendant, Brasswell; that the true meaning of our statute (Shannon, § 4542) is that suit may be brought in any county where a corporation, company, or individual has an office, agency, or place of business located in the county, and does not mean a mere traveling agent, but one resident in the county, citing *Chicago & Alton Railway Co. v. Walker*, 9 Lea, 481.

The testimony of Brasswell was, in substance, that he was defendant's agent to buy logs; that he made purchases without consulting with them, and drew drafts on them, signing the same as agent; that he had paid out for them in Fentress County about \$80,000 for logs; that he received his mail and had his washing done in Pickett County, Tennessee; that he operated in Fentress, Pickett, Overton, and Clay Counties, in Tennessee, and bought some logs in Clinton and Wayne Counties, Kentucky; that he traveled from place to place, stopping wherever convenient, carrying his books, branding iron and draft book, with him; that he brands the timber, and that he advanced money to the complainants to a specified sum on the contract on which this suit is based; that he was frequently in Fentress County, and had stayed three or four days at a time in its county town, but that most of the time he was on the several rivers that run through

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his territory; that complainant's residence as a corporation was in Fentress County, while the defendant's, as a firm or partnership, was in Davidson County.

This Court, in construing the statute to which we have referred (Shannon, § 4542), has held that the agency intended by the statute means some office, agency, or place of business located in the county, and does not mean a mere traveling agent, but an agent resident in the county. *Chicago & Alton Railroad Co. v. Walker*, 9 Lea, 481.

We think that case analogous to the present, and, following its holding, we are of opinion that Brasswell was not such agent as is contemplated by the section, and the service upon him was not sufficient to give jurisdiction of the firm of Lieberman, Loveman & O'Brien.

It follows that the decree of the Court of Chancery Appeals is affirmed.

Vaughan v. Garner and Black v. Garner.

VAUGHAN v. GARNER,

AND

BLACK v. GARNER.

(Nashville. December 15, 1900.)

GARNISHMENT. *Fund not subject to, when.*

A garnishee is not subject to judgment upon an answer admitting receipt of money from the judgment debtor in part payment of the latter's obligation to him, of which a balance remains unpaid after application thereto of the amount so received and the exhaustion of all collaterals and other available sources of satisfaction.

FROM FRANKLIN.

Appeal in error from Circuit Court of Franklin County. FLOYD ESTILL, J.

ARTHUR CROWNOVER for Black.

W. H. BRANNAN and H. M. TEMPLETON for Garner.

WILKES, J. These are separate garnishment proceedings, for convenience heard together in the Court below and in this Court.

The proceedings were instituted before a Justice of the Peace. On appeal to the Circuit Court there were judgments against the garnishee. They have appealed to this Court and assigned errors.

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The substance of the assignment is that it was error to render judgment on the answer of the garnishee. The answer, so far as material, sets out the following facts: Allen Garner, the garnishee, held a trust deed upon a tract of land to secure a debt of \$997.93. This trust deed was executed by the father and mother of W. L. Garner. W. L. Garner made a verbal contract with Allen Garner to buy this mortgage debt for its face value, expecting when he became the owner of the debt that his father and mother would make him a deed to the land to satisfy the same. He agreed to pay Allen Garner \$300 in cash, \$100 on December 25, 1899, and the balance at the end of the year when the land was to become his. He only paid \$190 of the \$300 cash payment agreed to be made, and failed to pay the remainder of the \$110 at that time. He then desired to rescind the trade, but Allen Garner refused to do so, and declined to pay him back the \$190, but insisted on his right to foreclose the mortgage and sell the land for the remainder of the mortgage debt unpaid, and he did make sale of the land under the trust deed. At this sale the land failed to bring the mortgage debt, interest, and costs by the sum of \$22.50 after applying the \$190 as a credit.

Plaintiffs, being judgment creditors of W. L. Garner, attempted to appropriate this \$190 to their debts, upon the theory that, the trade for the

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mortgage debt having fallen through, it was in fact and law the property of W. L. Garner, the garnishee. The trial Judge was of opinion this was the correct status of the case. In this we think the learned trial Judge was in error. While the answer is not as full and explicit as it should be, we think the proper meaning of it is that W. L. Garner bought the mortgage debt, and it was to become his when it was paid for according to the contract with Allen Garner. In the meantime, and until it was paid for, it was to stand good to Allen Garner, and be held by him as surety for the balance due on the contract. He therefore had the right to exhaust the land by enforcing the mortgage or trust deed in order to pay the balance after applying the \$190 paid, upon the cash installment. In other words, we think that he had a right to hold this \$190 as a payment on the cash installment, and enforce his deed of trust for the balance.

The proceeds arising from an enforcement of the deed of trust and sale of the land not being sufficient, after applying the \$190, to satisfy the remainder of the debt, there was nothing in the hands of Allen Garner belonging to W. L. Garner that could be subjected to garnishment by the creditors of W. L. Garner, and the garnishment proceedings must fail. It results that the judgment of the trial Judge is reversed, and the suits dismissed at the costs of the plaintiffs.

Townsend v. Railroad.

TOWNSEND v. RAILROAD.

(*Nashville.* December 15, 1900.)

1. DECLARATION. *Averring negligent injury of passenger by carrier insufficient, when.*

A declaration, in an action by a passenger against a common carrier, is insufficient, which avers, in substance, that the plaintiff was injured by being thrown upon the depot platform by a sudden lurch of the train caused by the engineer's negligence, when he was in the act of stepping from the train, which he supposed had stopped, but which was, in fact, still in motion and approaching the station, upon an invitation to be implied from the action of defendant's employes in charge of the train, in blowing whistle, ringing bell, and announcing name of station as the train approached it.

Case cited: Railroad v. Massengill, 15 Lea, 328.

2. RAILROADS. *Invitation for passenger to alight not implied, when.*

The compliance by a railroad company with the statutory requirements of sounding whistle, ringing bell, and announcing name of station as trains approach it, does not afford any invitation, express or implied, or any excuse to passengers for alighting from the train while in motion, and before it has stopped at the station.

3. SAME. *Rights of passenger alighting from moving train by mistake.*

A passenger who suffers injury in alighting from a moving train, under the mistaken belief, not induced by the fault of the carrier, that the train had reached the station and stopped, has no cause of action against the carrier.

4. SAME. *Same.*

The fact that a passenger is unable to obtain a seat, and is com-

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pelled to stand on the platform of the coach, affords no excuse for his alighting from the train while in motion.

FROM WHITE.

Appeal in error from Circuit Court of White County. HON. W. T. SMITH, J.

SNODGRASS & FANCHER, STORY & KIRBY for Townsend.

JARVIS, HILL & JARVIS for Railroad.

WILKES, J. This is an action against a common carrier for personal injuries sustained by the plaintiff while attempting to alight from a train. There was a demurrer to the declaration, which was sustained, and the suit was dismissed, and plaintiff has appealed to this Court and assigned as error the overruling of the demurrer.

So much of the declaration as is material is that the train was coming into the depot sheds at Nashville. Plaintiff was standing upon the platform, having been unable to secure or hold a seat for some distance before reaching Nashville, as the coach was crowded. The railroad employees in charge of the train blew the whistle, rang the bell, and announced the station as they approached the depot. The train slowed up for passengers to alight, and when it came to the usual place of stopping, it had come to a stop,

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or so near to a stop that plaintiff thought it had stopped, and it appeared to have stopped, and by the conduct of defendant's conductor and employees in charge of the train plaintiff was impliedly invited to alight from the train. At the moment the plaintiff stepped off the step on which he had been forced to stand, and was in the act of alighting from the train, the engineer negligently and wrongfully caused the cars to lurch forward by a violent jerk, which threw him off his feet on the floor of the shed, breaking both bones of his wrist or forearm.

We are of opinion this declaration fails to state a cause of action. The blowing of the whistle, ringing of the bell, and calling out the name of the station is not an implied or express invitation to alight at once, but is merely a warning to be ready to alight when the train comes to a stop. The principle governing the case is stated in *Railroad v. Massengill*, 15 Lea, 328.

A passenger who steps from a moving train does so at his peril, and to absolve him from all contributory negligence, he must wait until the train has in fact stopped. He cannot recover upon his belief that it had stopped, or had come so near to a stop as to induce him to believe it had stopped.

His mistake, though innocently made, is not a matter upon which liability of the road can be predicated. If he was not misled by the acts

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of the railroad employees, or by their specific directions to alight, he must see that the train has in fact stopped, and if he do not, he takes the risk of injury upon himself if he attempts to alight.

The pivotal question in this case is not whether the plaintiff was excusable in being on the steps of the platform because he could not or was not furnished a seat, but, Did he exercise proper care in alighting, and had the train in fact stopped when he attempted to get off?

We do not think the case of *Chicago & Alton Railroad v. Arnold*, 19 L. R. A., 316, is in point here. The passenger was injured while in the coach, after she had left her seat for the purpose of alighting. Here the cause of the injury was in attempting to alight from the step, thinking the train had stopped, when in fact it had not.

We think the fact that plaintiff was not provided with a seat for some distance before he reached the city of Nashville can have but little if any weight upon the crucial question in this case. For all that appears from the declaration, he may have been provided a seat when he entered the cars, and may have given it up to others, and then been forced to ride on the platform or steps.

But the determining question in the case is whether, being in this exposed and dangerous situ-

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ation, he exercised proper care and caution in alighting, and whether, as a matter of fact, the train had stopped. Liability of the road cannot be predicated upon his mistaken belief that the train had stopped, and in the absence of a definite and specific averment that it had as a matter of fact stopped, no cause of action is stated.

We are of opinion, therefore, that there is no error in the judgment of the Court below, and it is affirmed with costs.

Payne v. Railroad.

PAYNE v. RAILROAD.

(Nashville. December 15, 1900.)

1. DECLARATION. *For injury of passenger by carrier, sufficient, when.*

A declaration, in an action by a passenger against a common carrier, is sufficient, which avers, in substance, that plaintiff was injured while engaged in making a necessary change of cars, at a station, under the direction of the carrier's servants, by being thrown violently upon the ground by reason of a sudden jerk of the train, caused by the engineer's negligence. (*Post*, pp. 168, 169.)

2. RAILROADS. *Passenger injured in alighting from train not entitled to recover, when.*

A railroad company is not guilty of any fault or negligence contributing to the injury of a passenger, who, without other invitation or excuse than the announcement required by statute of the approach of the train to a station where he must change cars, leaves his seat in the coach and proceeds to alight from the train while in motion, and before it has reached the station, and is thereby injured. (*Post*, pp. 169-171.)

Code construed: § 3070 (S.); § 2360 (M. & V.).

3. CHARGE OF COURT. *Does not erroneously invade province of jury.*

And, in such case, it is a harmless invasion of the province of the jury, if an invasion at all, for the Court to charge that plaintiff is not entitled to recover upon this state of facts. (*Post*, pp. 171, 172.)

4. SAME. *As to contributory negligence.*

A charge that instructs the jury that, upon an assumed state of facts, if found to exist, the defendant is not guilty of any negligence, is not erroneous as excluding consideration of plaintiff's contributory negligence. There can be no contributory negligence of plaintiff unless defendant has been guilty of some negligence. (*Post*, pp. 171, 172.)

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5. SAME. Request properly refused.

A request for additional instruction is properly refused which presents a proposition that is not applicable to any issue made by the pleadings or to any phase of the evidence. (*Post*, pp. 172-174.)

FROM FRANKLIN.

Appeal in error from Circuit Court of Franklin County. **FLOYD ESTILL, J.**

WHITAKER & HORTON for Payne.

W. B. LAMB, LYNCH & LYNCH for Railroad.

CALDWELL, J. W. L. Payne and wife, Sallie Payne, brought this action against the Nashville, Chattanooga & St. Louis Railway Company to recover damages for personal injuries alleged to have been wrongfully and negligently inflicted upon her while alighting from one of its passenger trains at Bridgeport, Alabama. Verdict and judgment being for the defendant, the plaintiffs appealed in error.

The averment on which the recovery was sought is as follows:

“Plaintiff, Sallie Payne, wife of plaintiff, W. L. Payne, was a passenger upon one of defendant’s train of cars, having purchased a ticket from Decherd, a station on said defendant’s road, to South Pittsburg, another station on said defendant’s road, and in order for plaintiff, Sallie Payne, to

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reach her destination, it was necessary for her to change cars at Bridgeport, Ala., and while she was undertaking to change cars as aforesaid, and was upon the steps in obedience to the direction or order of defendant's conductor or other agents and operatives, representatives and agents, managing and controlling the movements of said train of cars, wrongfully and negligently caused said train of cars to move with a sudden and violent jerk, throwing plaintiff, Sallie Payne, without fault or negligence on her part, off the steps or platform aforesaid, violently to the ground, and so injuring, bruising, and maiming plaintiff," etc.

The defendant pleaded not guilty, and upon the issue so made the case was tried.

The only controversy of fact was in respect of the manner and cause of the injuries sued for.

The plaintiff introduced testimony tending to show that they resulted from the negligence imputed to the defendant in that part of the declaration just quoted herein; and the trial Judge correctly instructed the jury that such facts, if established by a preponderance of the evidence, would entitle the plaintiffs to a recovery.

The defendant introduced testimony tending to show that its agents, as the train neared Bridgeport, announced the name of the station, and that a change must there be made for South Pittsburg, and that Mrs. Payne thereupon, before the train reached the station, walked from her seat

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in the coach to the platform, down the steps, and alighted while the train was still in motion. As applicable to the defendant's theory of non-liability, so disclosed the trial Judge instructed the jury that "if the proof in this case shows that the employees of the defendant company, while approaching the station at Bridgeport, announced, 'Bridgeport, change cars for South Pittsburg,' and thereupon the plaintiff arose from her seat, and went upon the platform, and upon the steps of the platform, and alighted from the coach before reaching the station, and while the train was in motion, she would not be entitled to recover in this case."

This instruction is the subject of the first assignment of error in this Court, the criticism being that the trial Judge thereby "takes the question of plaintiff's contributory negligence from the consideration of the jury and declares a given statement of facts to constitute negligence *per se*."

It is to be observed in the first place that the criticism misinterprets the instruction and ascribes to it functions that it does not perform.

The instruction does not in fact deal with the subjects of contributory negligence and negligence *per se* at all.

In the next place, the instruction is entirely sound when properly limited to its own suppositional statement of facts. There is no interpretation, of which those facts are susceptible, that

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would give the plaintiffs a legal right of action; they disclose no actionable negligence on the part of the defendant. The announcement, as the train approached Bridgeport, of the name of the station and the change there to be made, which is the only function attributed to the defendant in the hypothesis of this instruction, was not a negligent act, but a compliance with the statute (Shannon, § 3070), and hence the discharge of a legal obligation. It follows inevitably, therefore, that this act, which, according to the defendant's theory, was its only connection with Mrs. Payne's injuries, could not have rendered it liable for them, and that the instruction of nonliability on that theory was correct, whether her conduct be characterized as cautious or as negligent in one degree or another. Upon its theory of its part in the matter, as submitted in this instruction, the defendant was manifestly guilty of no negligence whatever, and, as a consequence, it was free from liability whether Mrs. Payne was negligent or not. The first element of liability is wanting. If it were conceded that the instruction impliedly precludes the consideration of the question of contributory negligence, the instruction upon the facts submitted therein would, nevertheless, be correct, for under those facts the defendant was undoubtedly blameless, and the doctrine of contributory negligence is never applicable unless both

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parties have been negligent. There can be no contribution of negligence in the legal sense by or to a person not himself negligent.

If the Court's reference in this instruction to the suppositive acts of Mrs. Payne be taken as an implied declaration that she was thereby guilty of negligence *per se*, the erroneous invasion of the province of the jury so made would be entirely harmless, since, without that declaration as with it, the defendant would inevitably have been protected against legal responsibility for her injuries by the utter lack of negligence on its part under the other facts submitted in the same instruction.

The other assignment of error complains of the action of the trial Judge in refusing the request of the plaintiffs, seasonably made, to instruct the jury as follows:

"If the jury find from the evidence that the plaintiff started to leave the train, while the same was in motion, or walked out on the platform or steps while the same was in motion, and that this was done by the express or implied invitation of the agents or employees in charge of the train to get off, this would not be contributory negligence *per se*, such as would defeat plaintiff's right of recovery, but it becomes a question for the jury to determine, under all the circumstances, looking to the facts as to whether

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plaintiff was expressly or impliedly invited to alight, the speed of the train, to the physical condition of the plaintiff, and all the facts and circumstances surrounding the plaintiff at the time she left her seat for the purpose of alighting."

The refusal to give this instruction was proper, if for no other reason, because it presents a question not embraced in any issue raised by the pleadings, and also because not applicable to any theory developed by the testimony on behalf of either party.

The plaintiffs neither aver nor attempt to prove that the injuries sued for resulted from an "express or implied invitation" to get off the train while in motion; but, on the contrary, the theory of their declaration, and of their testimony, is that those injuries were caused by "a sudden and violent jerk" of the train after it had stopped, and while Mrs. Payne was on the steps attempting to alight.

The defendant's theory is that Mrs. Payne was injured by jumping from the train while in motion, and without invitation. Though in conflict with each other, these theories are alike inconsistent with that submitted in the instruction refused.

The instruction might have been proper, under the rule announced in the case of *Railroad v. Stacker*, 86 Tenn., 343, if the plaintiffs had put

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their case, in pleading and proof, upon the ground of an invitation to alight from a moving train, but that rule was not applicable to the case they actually averred and attempted to prove, nor to the defense made by the defendant, consequently the instruction was properly, and not erroneously, refused.

Let the judgment be affirmed.

Goad v. State.

GOAD v. STATE.

(Nashville. December 22, 1900.)

1. INFAMY. *Of juror.*

Objection that juror is disqualified by a sentence of infamy is *propter defectum*, and comes too late after verdict. (*Post*, pp. 176, 177.)

Cases cited: *McClure v. State*, 1 Yer., 206; *Cartwright v. State*, 12 Lea, 620; *Draper v. State*, 4 Bax., 246; *Gillespie v. State*, 8 Yer., 507; *Hamilton v. State*, 101 Tenn., 418; *Givens v. State*, 103 Tenn., 666.

2. SAME. *Shown by record.*

The fact of infamy, when relied upon, must be proved by production of the record. (*Post*, pp. 176, 177.)

3. PERJURY. *Facts insufficient to support conviction.*

The facts set out in the opinion are held insufficient to support conviction for perjury. (*Post*, pp. 177-180.)

FROM MACON.

Appeal in error from Circuit Court of Macon County. HON. WM. T. SMITH, J.

I. L. ROARK and F. E. FAUST for Goad.

Attorney-General PICKLE for State.

WILKES, J. Defendant is convicted of perjury, and sentenced to the penitentiary for three years, and has appealed.

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'It is said in his behalf that a new trial should have been granted because one of the jurors who tried the case was incompetent.

It appears from the sworn statement of Elijah Snider, the objectionable juror, that he was convicted in the Federal Court at Nashville of robbing the mail while he was a mail carrier. No record of his conviction, nor of the sentence upon it, was produced. The affidavit states that he was sent to a reformatory school in New York for the offense, being at the time about seventeen years of age, and that it had been seven years since he was discharged.

This is not sufficient ground for reversal. It does not appear that this conviction for robbing the mails carries with it, under the Federal Statute, a sentence of infamy, nor that one was pronounced by the Court. The fact of the conviction is not shown by the record of the Federal Court, nor is the character and extent of the sentence. It does not appear that Snider was sentenced to the penitentiary; on the contrary, it appears he was sent to a reformatory school. The objection was not made until after verdict. It is an objection "*propter defectum*," and must have been made before the verdict; and ignorance of the fact does not excuse the omission. *McClure v. The State*, 1 Yer., 206; *Cartwright v. The State*, 12 Lea, 620; *Draper v. The State*, 4 Bax., 246; *Gillespie v. The State*, 8 Yer., 507; *Hamil-*

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ton v. The State, 17 Pickle, 418; *Givens v. The State*, 19 Pickle, 666.

It is said that the evidence in the case does not warrant the conviction, because the matter sworn to was not material to the issues involved in the suit in which the affidavit was made, and because the swearing was not corruptly or knowingly false, but was simply a mistake of law upon the defendant's part. It appears that one Lyle had sold the defendant a half interest in a sawmill, that he gave his notes for the same, and a lien was retained on the half interest to secure the notes. Lyle filed a bill to obtain judgment on these notes, and to subject the half interest in the mill, and did recover judgment for \$482.66, but the decree ordered the entire mill in question to be sold to satisfy the judgment. This seems to have been done by agreement. The mill was sold, but when and for how much does not appear. An execution issued for the balance not paid from its proceeds, and was levied on a one-fifth interest of defendant, Goad, in another tract of land. It was sold and deed made to Lyle. Thereupon Lyle, Wood, and Sullivan filed a bill to partition this land, and to set aside as fraudulent a deed made by Goad to his wife of his interest in it, and an amended bill was filed to stay waste. In this case a deposition was given by Goad, in which he stated that before

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the mill was sold by the Court he had sold and transferred it to Harlan & Wooten to pay the judgment of the Supreme Court, and they were to satisfy the same, and that he understood it was satisfied by them.

Wooten testified that pending the litigation in regard to the mill, and as a condition for a continuance, an agreement was entered into by himself and Harlan, as attorneys for Lyle, and Mr. Roark, an attorney representing the defendant, that the whole of the mill should stand good for whatever recovery Lyle might get in said cause, instead of merely the one-half interest which had been attached originally; but that he did not purchase the mill nor agree to satisfy Lyle's judgment, and that he made no other agreement except as stated. Harlan proved substantially the same thing; as a matter of fact the whole mill was sold to satisfy the judgment. Defendant's explanation is that he had reference in his deposition to the agreement made with Wooten & Harlan that the whole mill was to stand for the recovery, and satisfy the same, as it was worth twice the amount of the debt, and that he told them, after the case was decided in the Supreme Court, that he had agreed the mill was to go that way, and to take it. It appears that Goad, after this agreement, continued to litigate his liability upon the original debt upon which the judgment was rendered, and

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when asked to explain why he did this, said he did not understand the inquiry.

We do not think this makes out a case of willful and corrupt false swearing. The defendant probably understood that by letting the whole mill stand for whatever might be recovered, instead of the half interest that was attached, he had in effect satisfied or provided for the debt. His continuing to litigate the justice of the original claim seems to be inconsistent with this view, but we think he did this under the belief that the demand was an unjust one, and that if it was defeated, the mill would not be taken from him under the agreement that it was to stand for whatever recovery was had.

It appears that the partition suit failed, because the complainants failed to introduce the judgment, execution, and report of sale of Goad's interest in the land, and it is evident that in the absence of such proof complainants did not show any interest in or title to the land. The decree of the Court must have been the same, even if the defendant had not sworn in the case, and in that sense it was immaterial, but we do not base our holding on this feature. We think there is not that clear evidence of knowledge of the falsity of the statement necessary to make out a case of perjury, but that it is simply a case of misunderstanding as to what the agreement really was or what its effect would be,

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and defendant characterized the matter as a satisfaction when in fact it was only a mode by which satisfaction would be made.

The judgment of the Court below will be reversed, and cause remanded for a new trial. State will pay costs.

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(*Nashville.* December 22, 1900.)

1. CRIMINAL PRACTICE. *Issue sufficiently shown, when.*

Where it appears, from the record, that the jury, in a felony case, were sworn "to try the issue joined," there will be no reversal on account of the absence from the record of any formal entry of a plea by the defendant and issue thereon.

Code construed: § 7217 (S.); § 6083 (M. & V.); § 5242 (T. & S.).

Case cited and distinguished: *Lynch v. State*, 99 Tenn., 124.

2. BILL OF EXCEPTIONS. *Must be filed in time.*

When the time for filing bill of exceptions is extended, under Act of 1899, beyond the close of the trial term, it must affirmatively appear that it was filed with the clerk within the time allowed, in order to make it a part of the record.

Act construed: Acts 1899, Ch. 275.

Case cited: *Bettis v. State*, 103 Tenn., 339.

FROM COFFEE.

Appeal in error from Circuit Court of Coffee County. DAN. WILLIAMS, Sp. J.

W. V. WHITSON and B. P. BASHAW for Muse.

Attorney-general PICKLE for State.

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BEARD, J. This is a conviction of an assault with intent to commit voluntary manslaughter, with punishment fixed at eleven months imprisonment in the county jail, and the payment of a fine of five hundred dollars.

It is assigned for error that the record fails to show a plea of not guilty. This is true; but it does show that the jury were sworn "to try the issues joined," the necessary inference from which is that this plea was interposed.

In this respect the case differs from *Lynch v. State*, 99 Tenn., 124, which is relied on by plaintiff in error. There the entry on the minutes failed to show a plea or anything from which its existence could be implied. For this reason that case was reversed. Here, however, it being clearly implicable that such plea was filed, the statute forbids a reversal because the Clerk of the Court omitted to file or enter it of record. Code (Shannon), § 7217.

The assignment of error however, most earnestly pressed upon the Court, is, that the evidence does not warrant conviction. But in the condition of the record we cannot consider this assignment. The trial Judge, in overruling the motion for a new trial, allowed plaintiff in error thirty days within which to make and file his bill of exceptions. There is in the transcript a paper so entitled, but there is nothing to indicate that it was ever filed.

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In *Bettis v. State*, 103 Tenn., 339, a bill of exceptions was filed four days after the time allowed for its preparation. In the opinion it was suggested that there might be a doubt whether Chapter 275 of the Acts of 1899, allowing parties desiring to appeal to this Court thirty days in which to prepare a bill of exceptions, was intended to apply to criminal causes. But conceding that it did, it was held that the bill of exceptions in that case came too late. Since then we have had occasion to review the statute in question, and have announced in one or more of such cases that it does. Under this Act the bill of exceptions must not only be prepared, but filed within the extended period. To become a part of the record it must affirmatively appear that it was filed with the proper officer within the period of extension. *Jones v. Moore, Clerk, etc.*, and *Tucker v. Same*, opinion present term.

It is not improper to say that we have carefully examined the papers sent up as a bill of exceptions, and even if properly filed, would not be inclined to interfere with the judgment of the trial Court.

Affirmed.

State v. H. Robinson.

STATE v. H. ROBINSON.

(*Nashville.* December 22, 1900.)

1. SUPREME COURT. *Will not reverse conviction for misdemeanor, when.*

A conviction for misdemeanor will not be reversed on the facts, where the jury, upon a fair charge, has chosen to adopt and believe the State's, rather than defendant's, theory, although both are supported by evidence.

2. SAME. *No reversal for omissions in charge, when.*

This Court will not reverse for an alleged omission in the Court's charge to the jury, where it affirmatively appears, from the bill of exceptions, that the entire charge was not preserved and brought up, and that the omitted portion bore on the point complained of. This Court presumes conclusively, in such case, that the charge given to the jury was correct and satisfactory as to matters omitted from the record.

FROM DEKALB.

Appeal in error from Criminal Court of DeKalb County. M. D. SMALLMAN, J.

T. W. WADE for Robinson.

Attorney-general PICKLE for State.

WILKES, J. Defendant was convicted of unlawfully carrying a pistol, fined fifty dollars, and

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sentenced to six months imprisonment in the county jail, and he has appealed.

It appears that upon a public occasion the Sheriff of the county saw that the defendant had a pistol upon his person, and took it from him, and arrested him. Defendant relied upon the testimony of one witness in his defense. This witness, Charles Frazier, stated that he was a Constable in one of the country districts of DeKalb County; that he was in Smithville on the first day of the term of the Court, and saw that a breach of the peace was about to take place, and that four men were about to engage in a difficulty, and he thought he needed assistance to preserve the peace, and summoned the defendant to aid him, and if necessary to arrest the parties, and for that purpose he gave him the pistol, which the Sheriff afterwards took from him. After the parties separated he handed the pistol back to him, but he told him to keep it and carry it to the room at the hotel which both were occupying. The parties who had threatened the difficulty were still in town, though they had separated, and defendant kept the pistol, under the officer's directions; and there was considerable drinking in town that day.

The Sheriff testified that he and his deputies were in town that day, and heard of no such threatened breach of the peace, and were not called upon or notified of it, and that when he

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took the pistol from defendant and arrested him, he was in a restaurant eating oysters, and not on his way to the hotel. This is the substance of all the evidence there was in the case.

The Court charged the jury very fully, and said to them that if they believed defendant was carrying the pistol in good faith, and in order to assist, under the sanction and direction of an officer, in preserving the peace when a breach of it was imminent, that would excuse him, but if he carried it for any other purpose, and merely used this as an excuse or pretense, it would not. The names of the parties who were threatening a breach of the peace were not stated, and the testimony as to the threatened breach of peace is very indefinite and meager.

The jury had the two theories before them under a fair charge, and believed the State's theory, or at least did not give full credit to the theory of the defense, and we do not feel authorized to disturb their finding. It is said that the Court did not properly charge on the feature of a reasonable doubt. What the Judge said in the last clause of his charge was this: "How the facts are is a matter for the jury to determine from the evidence, and in determining the facts as before stated you must give the defendant the benefit of a reasonable doubt as before explained to you." The bill of exceptions, in setting out the charge, begins as follows: "The

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Court charged the jury fully and satisfactorily upon the law on the subject of carrying concealed weapons, and among other things not excepted to charged as follows," etc. Then follows a portion of the charge, and the last clause in the portion copied contains the reference to reasonable doubt which we have copied heretofore. It is evident from that clause that the Court had already explained reasonable doubt, as he closed the charge "you must give the defendant the benefit of a reasonable doubt as before explained to you."

We must assume, therefore, that the charge upon that, as well as all other features involved in the offense, was correct and satisfactory, and counsel did not think it necessary to set it out except some specific portions, as to which no complaint is made.

We think there is no error in the record, and the judgment of the Court below is affirmed, except that the sentence of six months confinement is remitted as being excessive under the facts.

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AND

TUCKER v. MOORE.

(*Nashville.* December 22, 1900.)

1. **REPLEVIN.** *Does not lie against receiver.*

Replevin does not lie against a receiver appointed by a Court to recover property impounded and placed in his hands by the Court.

2. **BILL OF EXCEPTIONS.** *Must be filed in time.*

Where time is given by order of Court beyond the close of the trial term for preparation and filing of bill of exceptions, the record must show affirmatively that the bill of exceptions was filed with the clerk within the time allowed.

Acts construed: Acts 1899, Ch. 275.

FROM DEKALB.

Appeal in error from Circuit Court of DeKalb County. M. D. SMALLMAN, J.

WEBB & CANTRELL for Jones and Tucker.

WADE & ROBINSON for Moore.

Jones v. Moore and Tucker v. Moore.

BEARD, J. These cases were heard together. They are actions of replevin. In each case the Court below entered a judgment of dismissal, and for the value of the property replevined, upon the ground that it was taken under the writ from the control and possession of a receiver, appointed by a Court of competent jurisdiction in a cause then pending, and that the action was instituted and the writ executed without the consent of that Court. This action is made the basis of error assigned by the respective plaintiffs in error.

These causes must be considered by us on the record entries alone. For while in each transcript we find what is entitled a bill of exceptions, yet in neither can the plaintiff in error avail himself of it as such. In each the trial Judge gave thirty days from the date of overruling the motion for new trial to prepare a bill of exceptions. In the case of *Tucker v. Moore* the record shows that more than thirty days elapsed before the bill of exceptions was filed. This was too late. *Bettis v. State*, 103 Tenn., 339.

In the case of *Brunette Jones v. Moore* the record fails to show when the paper purporting to be a bill of exceptions was filed. Under Chapter 275 of the Acts of 1899 filing within thirty days is essential, and this is defined to be a delivery of the paper in question "into the actual custody of the Clerk, to be kept by him among the files, subject to the inspection of the

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parties." Ency. Pl. & Pr., 923. And the record must affirmatively show that this was done. *Muse v. State, ante*, p. —, opinion present term. The mere bodily presence of the paper in the transcript, without more, is not sufficient. The result is that we are bound to assume that the trial Judge was warranted in finding that the property involved was wrongfully taken out of the custody of a duly appointed receiver without the permission of the Court appointing him. Such a proceeding cannot be tolerated. It is well settled that property in the hands of a receiver is *in custodia legis*, and cannot be interfered with by process of another Court. *Morrill v. Noyes*, Am. L. R., Vol. 3, p. 21, cited and approved in *Conley v. Deers, etc.*, 11 Lea, 274; 20 A. & E. E. of Law, 1st ed., pp. 141 *et seq.*, and notes.

Judgment in each case is affirmed.

Insurance Co. v. Webb.

INSURANCE CO. v. WEBB.

(*Nashville.* December 22, 1900.)

1. CERTIORARI AND SUPERSEDEAS. *Does not lie, when.*

A judgment cannot be impeached or reviewed by certiorari and supersedeas upon the ground that the petitioner was not served with process, where it appears from the return of an officer in the original record that he was served with process. The return of the officer cannot be impeached or contradicted in such proceeding. The petitioner's remedy, if the return is false, is by bill in equity or by action against the officer.

Cases cited: *Wilson v. Moss*, 7 Heis., 418; *McBee v. State*, Meigs, 122; *Ridgeway v. Bank*, 11 Hum., 525; *Gardner v. Barger*, 4 Heis., 671.

2. SUPREME COURT. *Objection made after hearing comes too late.*

Objection made after hearing of cause that transcript or assignment of errors was not filed within the time required by the rules of Court, comes too late.

FROM DEKALB.

Appeal in error from Circuit Court of DeKalb County. M. D. SMALLMAN, J.

B. M. WEBB for Webb.

WADE & ROBINSON and P. M. ESTES and MOREAN
P. ESTES for Insurance Co.

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WILKES, J. This is a petition to supersede and quash an execution upon the ground that the petitioner, Webb, was never served with process, and the judgment of the Justice of the Peace of Davidson County was therefore void for want of jurisdiction.

There was a motion to dismiss, which was sustained so far as petitioner sought to obtain a new trial, but overruled so far as the petitioner sought to supersede the execution issued in DeKalb County on an execution certified from Davidson County. The trial Judge heard the case upon the evidence, and granted the relief prayed for, and plaintiff has appealed and assigned errors. We think there is error in the action of the Court below in declining to dismiss the petition outright. In the case of *Wilson v. Moss*, 7 Heis., 418, it appeared that the petitioner had a good defense upon the merits, and that the judgment against him was unjust, but the allegations in the petition that the petitioner was never served with process was contradicted by the return of the officer indorsed on the warrant, and it was held that no allegations could avail against such return. Citing *McBee v. State*, Meigs, 122; *Ridgeway v. Bank*, 11 Hum., 525; *Gardner v. Barger*, 4 Heis., 671.

This did not deprive the petitioner of his remedy in chancery, nor by action against the officer making the false return. In the present

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case there was a return of service indorsed on the warrant by the officer, and it could not be contradicted by parol upon a petition to supersede the execution.

It is objected that the record in this case was not filed until the tenth of December, and hence the case does not stand for trial at the present term of the Court.

And again, that the errors were not assigned within the time prescribed by the rule. The original record appears to have been filed December 2, and the assignment of errors on the tenth of December. A supplemental and amended transcript appears to have been filed at the latter date, and we will presume it was done either upon a suggestion of diminution or by consent. No objection was made to either the transcript or assignments until after the case was called and heard, and we think the objections are not well taken, and come too late.

The judgment of the Court below is reversed, and the suit dismissed at petitioner's cost.

Madden v. Mason.

MADDEN v. MASON.

(*Nashville.* December 22, 1900.)

1. COURT OF CHANCERY APPEALS. *Examples of findings of fact.*

A finding by the Court of Chancery Appeals, in a suit by or on behalf of a married woman to set aside her deed, that she was not insane when the deed was made, and was not coerced by her husband to sign it, is a finding of fact that is conclusive upon this Court. (*Post*, pp. 196, 197.)

Code construed: § 6322 (S.).

2. SAME. *Example of finding on question of mixed law and fact.*

A finding by the Court of Chancery Appeals that a married woman's acknowledgment of her deed was properly taken, is one of mixed law and fact. The finding of what was actually done by the officer and the married woman touching the acknowledgment is one of fact that is conclusive upon this Court, but the conclusion drawn from such facts is one of law that this Court determines for itself. (*Post*, p. 197.)

Code construed: § 6322 (S.).

3. DEED. *Correction of certificate of acknowledgment.*

The correction, duly made, of an insufficient certificate of acknowledgment of a deed relates back and takes effect, as between the parties to the deed, as of the date of the original acknowledgment. (*Post* p. 198.)

Code construed: § 3759 (S.); § 2896 (M. & V.); § 2082 (T. & S.).

Case cited: *Grotenkemper v. Carver*, 9 Lea, 280.

1. SAME. *Same.*

The authority conferred by statute upon clerks to correct insufficient certificates made by themselves of the acknowledgment of deeds taken by them, has been extended, by construction, to notaries public with reference to insufficient certificates made by them of the acknowledgment of deeds taken by them. (*Post*, p. 198.)

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Code construed: § 3759 (S.); § 2896 (M. & V.); § 2082 (T. & S.).

Cases cited: *Garth v. Fort*, 15 Lea, 683; *Brinkley v. Tomeny*, 9 Bax., 275; *Grotenkemper v. Carver*, 9 Lea, 280.

5. SAME. Same.

A correction of the certificate of privy examination of a married woman to her deed, made not in open Court but before a County Judge, upon the oath of the officer who took the original acknowledgment, identifying himself, is not authorized by the statute providing for correction of such certificate upon the officer "making oath in open Court to the truth of such correction," and is void. (*Post*, 198-200.)

Code construed: § 3759 (S.); § 2896 (M. & V.); § 2082 (T. & S.).

FROM FRANKLIN.

Appeal from Chancery Court of Franklin County.
T. M. McCONNELL, Ch.

T. J. ALEXANDER and TURNEY & TURNEY for
Madden.

GEO. E. BANKS and LYNCH & LYNCH for
Mason.

CALDWELL, J. Ed Madden, as next friend of his widowed mother, Eliza Madden, filed this bill on the twenty-eighth of December, 1897, to set aside a deed in fee simple, whereby his father and her husband, Mike Madden, on the first day of September, 1888, undertook to convey a certain house and lot, belonging to her, in the town

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of Cowan, to defendant, Edward Mason, for the recited consideration of \$1,300, paid and to be paid to the conveyor. Though not appearing in the body of the deed, her name was attached at its end, and a certificate of acknowledgment by her was indorsed upon the deed on the fourteenth of September, 1888, two weeks after the execution and acknowledgment by her husband.

Among the alleged grounds on which the relief just stated was sought are the following: First, that Eliza Madden was, at the time the deed was made, of unsound mind; secondly, that she was coerced by her husband to sign her name to his conveyance; and, thirdly, that her acknowledgment was not legally taken and certified.

Edward Mason, and his co-defendants, to whom he had conveyed the property, filed answers denying all hurtful allegations against their title.

The Chancellor granted the relief prayed for, but the Court of Chancery Appeals reversed his decree and dismissed the bill.

The complainant has appealed to this Court, and here assigned errors.

The first assignment is that the Court of Chancery Appeals erroneously found that Mrs. Madden was not of unsound mind at the time the deed was made. The finding here assailed, being one of fact only, is rendered conclusive and placed beyond the jurisdiction of this Court by the express terms of the statute. Shannon, § 6322.

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The second assignment is that the finding of that tribunal that Mrs. Madden was not coerced by her husband to sign and acknowledge the deed is erroneous. The answer just made to the first assignment is equally applicable to this one.

The third assignment challenges as erroneous that Court's finding that Mrs. Madden's acknowledgment of the deed was properly taken.

This objection raises a question of mixed fact and law. The statement of the conclusion of the Court of Chancery Appeals as to what was actually done by her and the certifying officer in respect of her acknowledgment of the deed is a finding of fact, and, hence, binding on this Court; but the statement of its conclusion of the legal effect of what they did in that matter is a finding of law, reviewable here. Shannon, § 6322.

The deed in question, as it appears in the record, is accompanied by two certificates of the notary public before whom the acknowledgment of Mrs. Madden is found to have been made, one of them having been written on the same paper at the foot of the deed September 14, 1888, and the other having been written on a printed blank and attached to the deed May 21, 1898, some months after the filing of the bill. The former of these certificates is concededly void for the lack of essential statutory recitals which need not be mentioned; but the latter one

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contains every required recital, and, hence, in point of form it is without ground of adverse criticism. Both certificates were based upon the same acknowledgment, the latter one being made on the day it was attached, for the purpose of correcting the fatal defects in the former one, and thereby avoiding the bill's impeachment of the deed on this particular ground.

The statute (Shannon, § 3759) which expressly authorizes a clerk to correct his certificate of acknowledgment by a married woman, so as to conform to the actual facts of the acknowledgment (*Garth v. Fort*, 15 Lea, 683) by implication confers the same power on a notary public (*Brinkley v. Tomeny*, 9 Bax., 275; *Grotenkemper v. Carver*, 4 Lea, 379), and the correction, when properly made under the statute, takes effect, as between the parties, as of the date of the original acknowledgment. *Grotenkemper v. Carver*, 9 Lea, 280.

The statute is in these words: "If a clerk omit any words in the certificate of privy examination by him taken of a married woman touching the execution of any deed or other instrument by her executed, he may at any time, on application of either of the parties interested, correct such error, mistake or omission, *making oath in open Court to the truth of such correction.*" Code, § 2082; M. & V., § 2896; Shannon, § 3759.

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For the purpose of emphasis we have italicized the last clause, which is mandatory, and embraces three indispensable elements, (1) "oath," (2) "in open Court," (3) "to the truth of such correction." The burden of showing compliance with this requirement is upon those who seek the benefit of the corrected certificate.

The finding of the Court of Chancery Appeals is, that "on May 21, 1898, said Beresford appeared before the Judge of the County Court of Davidson County, and in his capacity as a notary public for Franklin County, Tennessee, made oath that he was the same C. H. Beresford who took the acknowledgment of Mrs. Madden to the deed executed by Mike Madden at Cowan, Tennessee, to Ed. Mason, September 14, 1888, and made the corrections necessary to make said acknowledgment and privy examination conform to the requirement of the statute." Condensed and analyzed, this finding is only that (1) the notary public appeared before the County Judge, (2) and by oath identified himself as the person who took Mrs. Madden's acknowledgment ten years before, (3) and thereupon made such corrections as was necessary to give the certificate proper form.

There is no finding that the notary's oath was made "in open Court," nor that he swore "to the truth of the correction;" and yet the statute imperatively required that both should be done to authorize the corrected certificate, and the burden

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was upon the defendants to show that both were done, to entitle them to the benefit of the certificate.

The finding that the notary appeared before the County Judge and made oath to his own identity is in no sense a finding that he made "oath in open Court to the truth of the correction" embodied in his second certificate; hence that certificate is not supported by the finding actually made by the Court of Chancery Appeals, and, being without other support, it is wholly without justification in fact, and, consequently, without efficacy in law.

It may well be remarked, in conclusion, that, although the statute does not so require (*Grottenkemper v. Carver*, 4 Lea, 379), it would be more orderly to enter the oath of the correcting officer, or some note thereof, on the minutes of the Court. It would certainly facilitate all investigations like the present one if that course were pursued, or if a certificate of the proceeding were made to accompany the corrected certificate when attached to the deed and spread upon the Register's book. Indeed, it would serve the desirable purpose of perpetuating the real facts, and be of but little expense, to do both. These, however, are but precautionary suggestions.

For the reasons stated the decree of the Court of Chancery Appeals is reversed and that of the Chancellor affirmed.

Litterer & Co. v. Timmons.

LITTERER & Co. v. TIMMONS.

(*Nashville.* January 5, 1901.)

1. SUPREME COURT. *Will not reverse.*

This Court will not reverse a judgment otherwise correct, rendered by a Judge in a law cause without intervention of jury, upon objection that it is erroneous because based upon a specific erroneous ground or theory—to wit, estoppel—when there is nothing in the record to show that it was based upon such ground or theory except the motion for new trial.

2. SAME. *Same.*

This Court will not reverse a law cause tried by a Judge without intervention of jury, upon the facts, if there is any evidence to support the judgment.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. J. W. BONNER, J.

DOUGLAS WIKLE for Litterer & Co.

E. S. SCRUGGS for Timmons.

WILKES, J. This case was commenced before a Justice of the Peace of Davidson County, in 1898, to recover rent for a storehouse in Thompson Station, from August 1, 1895, to January 1,

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1897. This storehouse was occupied by one Critz, who, as the defendant testifies, was to sell merchandise for him on commission, but who was not authorized to contract any debts against the defendant. Judgment was given for \$85 by the Justice, and defendant appealed to the Circuit Court of Davidson County. The cause was there heard, without a jury, and the judgment of the Justice affirmed. Defendant has appealed to this Court, and assigns as error:

1. That the Court erred in holding that the defendant was estopped from denying his liability on plaintiff's debt because of his failure to notify plaintiff that he would not be liable for same when he first learned that his agent was occupying plaintiff's house.

There is no request made of the trial Judge to reduce his finding of fact and law to writing, and there is nothing in the record, except in the motion for a new trial, which shows that estoppel was the ground for the trial Judge's judgment. This assignment, therefore, is not well made.

2. There is no evidence to sustain the judgment of the Court below. The only real question of fact in the case is whether the defendant rented the storehouse or made himself liable to the plaintiff for it to be occupied by his agent. The evidence of the plaintiff makes out a clear

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case of liability, and, this being so, under the rule of this Court that when there is any evidence to support the finding, the judgment of the lower Court will not be disturbed.

The judgment must be affirmed with costs.

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STATE v. ROBINSON.

(Nashville. January 5, 1901.)

1. JURY TRIAL. *Opinion of juror does not disqualify, when.*

A juror is competent to sit on the trial of a felony case if he affirms that he can disregard a preconceived opinion and give the defendant a fair and impartial trial upon the law and the evidence, although he states, also, that he has formed and expressed a fixed opinion upon the question of the defendant's guilt, which he still entertains, and that it would require evidence to remove, when his opinion is based on newspaper and other like accounts of the transaction, which, though deemed reliable, did not purport or appear to be, and were not considered by him, as embodying the statements of witnesses or other person acquainted with the facts. (*Post*, pp. 205-207.)

Case cited: *Woods v. State*, 99 Tenn., 182.

2. SAME. *Swearing officer to attend jury.*

It is not reversible error for the trial Judge, at chambers, without the presence of defendant or his counsel or notice to them, to appoint and swear an additional officer, upon an emergency arising that required such action, to assist in keeping a felony jury in proper custody and in protecting them against outside interference. (*Post*, 207-209.)

3. SAME. *Improper conduct of District Attorney not cause for reversal of verdict, when.*

Although it is improper for the District Attorney to propose, in a felony case, to prove by parol, if no objection was made by defendant, that a witness, whose deposition defendant was offering to read, was under sentence of infamy, still such action on his part does not constitute reversible error where the Court ruled that it was improper and the District Attorney, upon objections by defendant, withdrew his statement and proposition. (*Post*, pp. 209, 210.)

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4. MURDER. *Facts that support verdict for murder in second degree.*

The facts set out in the opinion are held to support a verdict of murder in the second degree with sentence of fifteen years imprisonment. (*Post*, pp. 210-216.)

FROM WHITE.

Appeal in error from Circuit Court of White County. W. T. SMITH, J.

Attorney-general PICKLE, SNODGRASS & FANCHER and JARVIS & HILL for State.

L. D. SMITH, B. G. ADCOCK and SMITH & HUDSON for Robinson.

WILKES, J. Defendant is convicted of murder in the second degree and sentenced to fifteen years in the State prison, and has appealed.

The killing of Erb Willhite by defendant is admitted, and the contention on the merits is that it was done in self-defense, or, if this may not be sustained under the proof, that there was not such malice as would make the killing murder in the second degree, but that it was done in a sudden heat of passion provoked by a blow from the deceased.

The State insists, however, that there was an old grudge between the parties arising out of a

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former difficulty with a brother of the defendant, and that the killing was malicious and unjustifiable.

The defendant has been ably defended and his cause has been elaborately presented by learned counsel, and several assignments of error are made, in addition to an oral argument on the facts and merits of the case.

It is objected that Howard Smith and J. R. Robbins, two of the jurors who tried the defendant, were incompetent to act as such. These gentlemen, on their *voir dire*, stated that they had formed and expressed an opinion as to the merits of the case and the guilt of the defendant; that this opinion was based upon information which they relied upon and believed to be true; that they had read the newspaper accounts of the killing, but that they did not know that those from whom they obtained their information knew or professed to know the circumstances of the case; that they had a fixed opinion based upon this information, which they regarded as true and reliable, and one which it would require proof to remove; that they could, however, try the case according to the law and evidence, and give the defendant a fair and impartial trial. The parties were held by the Court to be competent; were accepted by the State but challenged by the defense, and were placed on the jury over the protest of the defendant.

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The defendant exhausted all his challenges in making up the jury, and was forced to accept a juror over his peremptory challenge. This is assigned as error.

We are of opinion that under the ruling of this Court in *Woods v. The State*, 15 Pickle, 182, there was no error in accepting these parties as competent jurors. They could not say that the accounts which they had heard and read were given by persons who knew or professed to know the facts, and they stated that they could render a verdict impartially upon the evidence, notwithstanding these preconceived opinions, which were formed, as we think, from rumor and not from any account by any one purporting or assuming to know or state the facts. We think the statements they had read and heard of the facts must be treated as rumor and do not disqualify the persons from acting as jurors.

It is next assigned as error that after the jury had retired to consider of the verdict, and while the Court was not in session and in the night time, and in the absence of the defendant, and without his knowledge or consent, or that of his attorney, the trial Judge appointed one W. D. Passons to assist the officer in charge of the jury. He was sworn, and, in connection with the other officer, waited upon the jury. The bill of exceptions does not state the reason why this additional officer was selected and

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sworn. It appears, however, from an affidavit made on the motion for a new trial by the officer in charge originally, that one William Robinson had obtruded his presence on the jury on two or more occasions, and while it does not appear that he held any improper communication with the jury, yet some of the jurors thought his conduct was improper and asked the officer in charge to apply for another to assist him. The Judge was telephoned to about the matter, and went to the hotel where the jury was quartered and selected Passons and swore him in to assist the regular officer. Some three or four of the jury were sick and seemed to be alarmed at what was being given them to eat at the hotel.

We think there is no reversible error in this action of the trial Judge. He was on the ground and saw and knew all the circumstances, and must have been convinced that it was necessary, under the circumstances, to have an additional officer to handle the jury. There is no valid exception or objection made to the party selected to aid the regular officer, and it is not stated that he had any intercourse with the jury, but was merely assisting to wait upon them; an emergency having arisen in the night time for this additional officer, it is not reversible error in the trial Judge to make this provision without attempting to convene Court and have the jury,

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defendant, and attorneys present when he made the appointment.

It is next objected that there was improper conduct on the part of the attorney for the State. The defendant offered to read the deposition of one Noa, when the District Attorney stated orally in open Court, in the presence of the jury, that the witness had been rendered infamous and had been sent to the penitentiary for stealing mules; that he did not have the record to establish the fact but that he had a witness who would prove it, and proposed to introduce and examine him if there was no objection, adding that he knew that it would be incompetent unless there was no objection, and asked counsel for defendant if he would object. The defendant's counsel objected, and thereupon the District Attorney withdrew his exception to the deposition, and it was read.

The trial Judge stated in open Court that the proposition of the District Attorney was improper. This statement and proposition of the District Attorney was improper, and should not have been made. While the record is meager as to what the Court stated, it does appear that the trial Judge said that it was improper and the District Attorney, upon objection, withdrew the statement and proposition, and the deposition was read without further exception. This was all that could be done to rectify the error, and we do not think it of such importance

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as to be reversible. Other objections were made to statements by the District Attorney, but we do not consider them of reversible importance. We are also of opinion that no sufficient ground for continuance was laid. The case had been pending for some time and had been twice tried. No special effort appears to have been made to get absent witnesses, and there was unnecessary delay in applying to have them attached. The evidence of the absent witnesses appears to be merely cumulative. There are other assignments which we do not deem material.

Coming to the merits of the case the defendant's version is that he and his father were returning to their home from Sparta, driving a wild team of horses in two-horse buggy; that they met the deceased and witness, Burgess, driving some calves in an opposite direction, and they were hallooing quite loudly, more so than was necessary to drive the cattle, but as if they were drunk. They met in a lane, and as the cattle came running along they frightened the horses and caused them to turn the buggy out of the road on the side and upon a bank, and threw him out. Defendant's father drove the buggy up the road about eight steps from where it turned over, and left the defendant standing at that place, where the deceased and Burgess came up and began cursing him; that he said to deceased that he wanted no fuss, and deceased

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called him a damned liar, when he replied he could take that from him; that he then started to get in his buggy, when deceased stepped between him and the buggy and called him a damned liar again, and he replied that he was another, and deceased then struck at him, but he warded off the blow to a considerable extent, so that he only hit his hat, but immediately struck him again in the eyes and knocked him down backward; that he caught on his hands; that deceased threw his hand into his pocket in front, and defendant then pulled his pistol and shot, firing at him four times. He thought deceased was trying to draw a knife or pistol, and he shot because he was afraid of being killed; that he begged him, when the quarrel first commenced, to get on his horse and go on, and that he wanted no difficulty, and had nothing against him; that deceased and Burgess came back to where defendant was; that after the shooting he got into the buggy with his father and went on home, about two and one-half miles, and stayed there until arrested; that his father told the deceased, when they were coming down the road driving the calves, to hold up, that he was scaring the horses, and that he replied that the road was free, to let them run.

Defendant and his father had some whisky in the buggy, and he had taken two or three drinks, but they were not drunk; that he was

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occasionally in the habit of carrying a pistol, but did not wear it all the time; that deceased never told him during the difficulty that he had no pistol. The defendant states that he had shot at another person three times on a previous occasion, but that Williams, the other party, had shot at him, and that he had a fight up at a saw-mill, but denied other difficulties about which he was questioned; that the next day after the shooting he went hunting in the mountains and stayed several days; and was arrested while going home just before day; that he got money and made arrangements to leave the country; that he was arrested about three months after the killing and had been dodging the officers, and that during the difficulty he had his hand on his hip, an attitude usual to him.

The testimony of the father is substantially the same as that of defendant. It appears that Combs, Burgess, and Will Jet were the only other eyewitnesses of the immediate difficulty. Both Jett and Burgess were with deceased when they met defendant and his father. Burgess' version is that as they passed the buggy defendant's father said something; that he helped to turn the horses and buggy back into the road, and while he was doing so defendant went down the road towards Willhite and took hold of the bridle of his horse and said: "You run over Charlie, but you can't run over me;" Willhite replied that he

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did not run over Charley, and defendant called him a liar. Willhite replied he did not want any fuss; that defendant had his hand on his pistol. Willhite got off his horse and threw the reins over a bush at the side of the road and told defendant not to do anything to him, and defendant told him to get on his horse and go on home or he would blow his head off; that defendant had his hand under his coat, but whether in his hip pocket or not he could not tell. A few words passed, and defendant called Willhite a liar and son of a —, and Willhite thereupon struck him in the face and knocked him back, and defendant drew his pistol and fired four times.

On cross-examination this witness confessed to many misdemeanors and crimes that he had committed, such as stealing watermelons and whisky, and causing disturbances at church, and stopping the mail, and that he had paid to get out of a great many scrapes—so many that he could not remember them; that he seduced his two cousins, and that he never stole anything he did not need; that he was a chum of the deceased and related by marriage; that Willhite was between the defendant and his buggy when he was shot, and that the defendant was not doing anything to deceased when he struck him, except calling him a liar and a son of a —. In his re-examination the witness attempted, with poor

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success, to explain his many escapades. He also stated that the deceased struck at defendant twice, but he thinks hit him only once, and staggered him back, but did not knock him down.

Will Jett, the other witness, was a negro, and testified to substantially the same state of facts as Burgess. He corroborates him in the statement that after defendant got out of the buggy he went on down the road to where deceased was, and that he took hold of his bridle reins and told deceased he could not run over him like he did over Charley; that deceased denied running over Charley, and got down off his horse, and defendant called him a damned liar, and told him to get on his horse and go home or he would blow his head off; that defendant had his hand under his coat all the time while talking to deceased; that deceased told him he was not armed and wanted no fuss; that when Willhite struck defendant he fired, but Willhite did not fall; that the first thing Willhite said in the trouble was that he had nothing against defendant and had nothing to fight him with; that after the trouble he went away from the county, at defendant's request and on his money; that Willhite was between the defendant and his buggy when the shooting occurred, and was doing nothing but talking and swearing.

The physician testified that Willhite was shot in the right side, about two inches below the

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right nipple. The ball ranged downward and went through the right lung, making a large wound, which caused the death; that Willhite was not under the influence of whisky when he was shot.

The character of the main witnesses is severely attacked, and it must be confessed that they do not well stand the test, especially Burgess; but it seems the jury believed them, and there is no very great difference between their statements and defendant's, except in the feature that they say the deceased told defendant he was not armed, and that the defendant advanced upon the deceased by going down the road to him.

It is earnestly insisted the facts do not make out a case of murder in the second degree, but at best only manslaughter done in a heat of passion. There is evidence tending to show something of a grudge by defendant against deceased, on account of his former treatment of his brother Charley, but it is insisted the real cause of the killing was the hot blood aroused at the moment by the blow which the deceased gave the defendant while intercepting him from his buggy.

The defendant denies that he made any reference to the former difficulty with Charley, but we think the weight of the evidence is that he did refer to it.

There are other features in the case, but we do not think they are of sufficient importance

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to pass on them specially. We think the weight of the evidence is that the defendant advanced upon the deceased in a threatening manner after he was thrown from the buggy, and cursed and abused him, and that he shot the deceased when he was in an upright position, and not on his knees; that deceased was unarmed and the defendant referred to the previous difficulty between deceased and his brother, showing an old grudge, and under these facts he is guilty as found by the jury, and the judgment is affirmed with costs.

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STATE v. FLEMING.

(Nashville. January 8, 1901.)

1. USURY. *Code provisions not repealed by conventional interest statute.*

The Code provisions relating to usury were not repealed or modified by the Act of 1869-70, creating a conventional rate of interest. (*Post*, pp. 218, 219.)

Acts construed: Acts 1869-70, Ch. 69.

Code construed: §§ 6732-3 (S.); §§ 5622-3 (M. & V.); §§ 4821-2 (T. & S.).

2. SAME. *Punishment of.*

Taking usury, less than ten dollars in amount, is punishable under the Code provision that "the punishment of this offense shall be a fine in no case less than ten dollars nor more than the amount of the usury received." (*Post*, pp. 219, 220.)

Code construed: § 6733 (S.); § 5623 (M. & V.); § 4822 (T. & S.).

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson County. HON. J. M. ANDERSON, J.

Attorney-general PICKLE for State.

LELLYETT & BARR for Fleming.

WILKES, J. This is an indictment for receiving usury. The charge is that defendant did exact

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and receive from one Eliza Benson, colored, as compensation for the use of money, an usurious rate of interest, to wit: 390 per cent. per annum on \$5, or \$1.60 for the use of \$5 for the period of one month.

The cause was tried in the Court below without a jury, and the learned Judge found the defendant guilty, and that \$1.60 was charged under disguise for the use of money, as charged.

Very many exceptions are made and many errors are assigned to the action of the Court below with great particularity of detail.

Our statutes in regard to usury are thus set out in Shannon's compilation:

Section 6732. "No person shall receive, by way of compensation for the use of money, more than at the rate of six dollars for the use of one hundred dollars for one year.

Section 6733. "The punishment of this offense shall be a fine in no case less than ten dollars nor more than the amount of the usury received, to be ascertained by the jury," etc.

These statutes had their origin in the Acts of 1835-6, Chap. 50. They are brought forward into our Code of 1858 as §§ 4821 and 4822, and in the compilation of Milliken & Vertrees as §§ 5622 and 5623.

The first insistence is that these Acts were repealed by the Act of 1869-70, called the conventional interest law, and when this latter Act was

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repealed by the Act of 1877, Chap. —, page 37, the former laws were not re-established or re-enacted.

We are of opinion this contention is not correct, and that the Act of 1835 (Code, §§ 4821 and 4822), was not repealed by the Act of 1869-70. That Act does not purport to repeal any former Act, but only to amend. It only provides, in substance, in the first section for a conventional rate of interest by written agreement of parties, and by the second section that the interest and usury laws then in force should remain as theretofore, in the absence of such written agreement; and by the third section a penalty and punishment is provided for a violation of the first section. The two Acts are not in conflict, but the Act of 1869-70 only provides for an exceptional case to be taken out of and not to be treated as within the provisions of the Act of 1835 and Code §§ 4821 and 4822.

The second contention is that under the wording and language of § 6733 it was never intended by the General Assembly to punish the taking of usury when the amount taken is less than ten dollars. In other words the statute says that the fine in no case shall be more than the usury received, and in no case less than ten dollars. So that if the usury received was less than ten dollars no fine can be assessed, and the argument is that for such a small offense the

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Legislature did not think proper to affix a penalty.

It appears that the section, from the peculiar collocation of words, is susceptible of this construction. But when we look to the original Act of 1835-6, from which it was compiled, the meaning and proper construction appear at a glance. It reads as follows:

“Shall be fined a sum not more than the whole usurious interest, so taken and received, which amount shall be ascertained by the jury trying the case; provided, no fine shall be less than \$10.”

We are of opinion, therefore, that the Act was intended to apply to all cases of receiving usury, no matter what the amount taken might be, and the provision is that the minimum punishment shall be \$10 in any case, but the maximum shall in no case exceed the usury taken, when the usury exceeds \$10. Using the same words of the statute, but in a different collocation, the section would read:

“The punishment of this offense shall be a fine not more than the amount of the usury received, to be ascertained by the jury, but in any case not less than ten dollars.” This we think is the proper meaning of the statute, and thus read the taking of usury in an amount less than \$10 subjects the taker to a fine of that amount. Taking usury to an amount greater than

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\$10 subjects the taker to a fine not more than the usury received.

Some exceptions are made that the evidence does not sustain the finding of the trial Judge, but we think they are not well made, and that the offense is made out, and we affirm the judgment with costs.

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NELLUMS v. NASHVILLE.

(*Nashville*. January 12, 1901.)

1. PLEADING AND PRACTICE. *What may be shown under plea of not guilty.*

In an action against a city for an injury caused by a defective plank walk upon an alleged street, the city may show, under the plea of not guilty, that it had never accepted the street nor become responsible for its repair. (*Post*, pp. 223, 224.)

2. NEW TRIAL. *Surprise.*

Surprise that justifies the granting of a new trial cannot be predicated of the introduction of any evidence that is pertinent to the issue made by the pleadings. Each party is required to anticipate and come prepared to meet such evidence of his adversary. (*Post*, pp. 224, 225.)

3. SAME. *Same.*

A party waives his right to a new trial on account of surprise, if he fails to take immediately all available steps, during the trial, to avert injurious consequences. (*Post*, pp. 225, 226.)

Case cited: *Railroad v. Jones*, 100 Tenn., 522. §

4. CHARGE OF COURT. *Refusal of requests.*

Requests for instructions that are fully covered by the original charge are properly refused. (*Post*, pp. 226-228.)

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. JNO. W. CHILDRESS, J.

Nellums v. Nashville.

RUTHERFORD & RUTHERFORD and H. A. LUCK
for Nellums.

E. A. PRICE and K. T. McCONNICO for City.

WILKES, J. This is an action against the Mayor and City Council of Nashville for damages, for personal injuries, sustained by Mrs. Nellums on account of a defective plank walk upon what is called in the record Belleville street. There was a trial before a jury in the Court below and verdict and judgment for the city, and the plaintiff has appealed and assigned errors.

The first error assigned is that the Court below should have granted a new trial upon the ground of surprise and newly discovered evidence. In support of this assignment plaintiff states that the city did not disclose its real defense until its last witness, Pat Cleary, was examined. This witness, in substance, stated that the city of Nashville had never done any work on the west side of Belleville Street, nor had it in any other manner accepted the same as a street since it was included within the corporate limits of the city in 1890.

The insistence is, that this was great surprise to the plaintiff, inasmuch as the fact of nonuser and nonacceptance was not specially pleaded, and the street had been used by the public, and was

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in a thickly settled part of the city, and had been recognized as a street by the public in numerous ways, and at many times, after it was taken into the city and prior to the accident.

The affidavit upon which the application for a new trial is based states this feature of surprise, and adds that plaintiff will make proof of user and many other facts showing acceptance on the part of the city, and it is supported, as to the latter feature, by the sworn statements of quite a number of witnesses.

The city filed only one plea, that of not guilty, and upon this the plaintiff took issue.

Under the plea, and upon this issue, we think it clear that the city might show by evidence that it had never accepted that portion of the street where the accident occurred. Some evidence was introduced upon this feature of acceptance, other than the testimony of Mr. Cleary, and at an earlier period of the trial. Mr. McConnico, the street overseer, testified that the portion of the street complained of was taken into the corporate limits in March, 1890, but that the city had done no work or repairing upon it up to the time of the accident, and it would be impossible to do it until a sewer was built, and that nothing had ever been done; that there is at the place an old ravine through which a branch runs, and there were little footways running to the houses across this. This being true, the plaintiff

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was bound to take notice of every defense that could be legally advanced under the plea of the general issue. Conceding the proposition to be correct that the evidence was within the issues presented by the pleadings, surprise cannot be predicated upon the fact that evidence was not anticipated along any line embraced within the pleadings. The doctrine is thus laid down in Vol. 16, page 544 (old Ed.), Am. & Eng. Ency. Law.

"The fact that an adversary's evidence is different from what it was supposed it would be, is not sufficient. If there has been any want of diligence in ascertaining what the testimony of a witness would be, a new trial will be refused." In 15 Ency. Pleading & Practice, 733, it is said: "A party is bound to come prepared to meet the case made by his adversary, and he cannot plead surprise at material and relevant testimony." In support of this proposition are cited *Cole v. Fall Brook Coal Co.*, 10 N. Y., 447; *Knapp v. Fisher*, 49 Ver., 94; *Davis v. Ruggler*, 2 Chand. (Wis.), 152; *Bragg v. Moberly*, 17 Mo. App., 221; *McNeally v. Stroud*, 22 Tex., 229; *Anderson v. Duffield*, 8 Tex., 237, and a number of other cases.

Another principle of law applicable to motions for new trial upon the ground of surprise is that the party who is thus surprised in the

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course of the trial must make all necessary efforts to secure delay by proper legal methods, in advance, to meet the matter of surprise. It appears from the affidavit of the plaintiffs that evidence of the acceptance of the street by the city could be readily had. Indeed, in the affidavit it is said that this evidence was so plentiful that they did not think it would be needed. The plaintiff, D. A. Nellums, was put back upon the stand, after the evidence of Cleary had been given, and he failed to give any evidence on the point. No delay or indulgence was asked by the plaintiffs. The plaintiffs could not, without making any effort to obtain such delay, go to trial, and when the verdict is found against them, ask for a new trial upon the ground of surprise. Am. & Eng. Ency. Law, 16 Vol., p. 533.

The rule is thus laid down:

"The first duty of counsel surprised at the trial is to secure delay by proper legal methods, but he cannot neglect this in hope of securing a verdict in spite of surprise, and then obtain a new trial." *Ibid.* See to same effect *Railroad v. Jones*, 16 Pick., 522; *Shipp v. Suggett*, 9 B. Mon., 5; *Mehan v. Chicago Railroad Co.*, 55 Iowa, 305.

It is said that the Court should have charged certain requests, seven in number, which the Court erroneously declined to do. Upon examining the charge we find it is quite full upon the subject

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of acceptance of the street by the city, and no complaint is made of any positive error in it. The requests go mainly to the question as to what acts would amount to or constitute an acceptance on the part of the city, putting hypothetical or supposed cases of repairs made, work done, or other acts indicating acceptance.

We think the charge of the Court as given fully covered the facts as they appeared in the record, as to acceptance, and the duty of the city after acceptance was plainly stated. The jury were told that if the city had not accepted the street, although it had been taken into the corporate limits either by some formal act of acceptance or by undertaking to open that part of the street by working the same or repairing the same and putting it in order for the public use, then they should find for defendant, but if the jury should find that proposition against the defendant, and that it had accepted the same or graded it, or worked upon it, and attempted to put the same in a condition for public use, then they should ascertain whether the city had constructed the passway over or across one of its streets, or part of it, and had exercised control over it, or permitted some other person to erect the walkways and afterward accepted them, and if so it should have kept them in repair, and it would be responsible for negligent failure to do so. This appears to be a full charge upon the facts as

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they were presented by the record, and is a fair statement of the law, and is not, so far as it goes, complained of. Dillon on Municipal Corp., Vol. 2, Sec. 642; *Forbes v. Bolen Seifer*, 74 Ill., p. 187; *State of Maine v. Bradbury*, 40 Maine, 154, 160; Tiedeman on Municipal Cor., Sec. 223, p. 421.

We think the several requests, so far as they are sound law, are covered by and embraced within the general charge, and that upon the record as we find it the charge was full and correct, and the requests very largely present hypothetical cases which are not presented by the record as made.

We do not find any reversible error in the action and judgment of the Court below, and it is affirmed with costs.

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SWAN v. RAILROAD.

(Nashville. January 12, 1901.)

COMMON CARRIER. *Right to demand demurrage.*

A common carrier may lawfully demand payment, as a condition precedent to delivery of goods to a consignee, not only of the stipulated freight charges, but likewise such reasonable charges for the unreasonable detention of its cars as may have accrued on account of the consignee's neglect or refusal to unload them, where such additional charges are contracted for and made a lien upon the goods by stipulation in the bill of lading.

Case cited and distinguished: Railroad v. Hunt, 15 Lea, 261.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. JOHN W. CHILDRESS, J.

WASHINGTON & ALLEN for Swan.

SMITH & MADDEN for Railroad.

WILKES, J. This is an action for the value of some stone, and the freight paid on the same, upon the theory that the stone was shipped to plaintiff over the defendant road, but was converted by the road, and plaintiff deprived of the same.

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The suit was brought before a Justice of the Peace. The defense was, in effect, the same as under a plea of general issue.

Upon trial before the Court and jury there was verdict and judgment for defendant, and plaintiff has appealed to this Court and assigned errors.

The facts, so far as necessary to be stated, are that three cars of stone were shipped to the plaintiff, P. Swan, from the Bedford (Ind.) quarries.

Mr. Swan was notified of the arrival of the cars of stone, and that upon payment of the freight the cars would be placed on the track leading to his yard, where he had a derrick and other machinery for unloading.

This track was constructed jointly by Swan and the Nashville & Chattanooga Railroad Co., and the Louisville & Nashville Railroad Co. had no interest in it or control of it.

The plaintiff, Swan, was further notified that charges for car service would begin to run after two days unless the freight was paid. Several other notices to the same effect were given him on successive days, but he failed to pay the freight until about ten days after the arrival of the first car, and seven days after the arrival of the last. He then sent a check to the company to pay the freight, but did not pay, and refused to pay any car service charges. He was informed

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that there was a demurrage, a car service charge, of \$21 upon the cars, and that this must be paid before the cars would be placed upon his track for unloading. He refused to pay anything on this account, and this suit is to recover for the value of the stone as upon a conversion.

The Louisville & Nashville Railroad Company moved the stone out of their yards after suit was brought, and unloaded it on its right of way in East Nashville, where it still remains, about two miles distant from the yards of the plaintiff.

Without passing specifically upon the errors assigned, it is only necessary to say that the real question presented in the case, and raised by the assignments, is, Did the railroad have the right to demand the prepayment of the freight before placing these cars of stone upon the plaintiff's yard track, and did it have the right to demand demurrage for failure to pay freight, and, after the freight had been paid, did it have the right to retain the cars of stone in its possession and under its control, unless and until the demurrage which had at that time attached was paid? The bill of lading under which this stone was shipped contained several clauses bearing upon the matter in controversy. Paragraph 5 is in these words: "Property not removed by the persons or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the car depot or place of delivery of the carrier at

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the sole risk of the owner of such property, or may, at the option of the carrier, be removed or otherwise stored at the owner's risk and cost, and they are subject to lien for freight and all other charges. The delivering carrier may make a reasonable charge every day for the detention of any car and for the use of the track after the car has been held twenty-four hours for unloading, and may add such charges to all other charges hereunder, and hold said property subject to lien therefor."

Paragraph 10 reads as follows: "The owner or consignee shall pay the freight at the rate hereon stated, and all other charges accruing on said property before delivery, and according to the weights as ascertained by any carrier herein." The contention of plaintiff is that the road has no right to make any demurrage charge, and that in any event its right to do so will not accrue until the cars are placed upon plaintiff's track, at the customary place of unloading, which was the inclosed premises of the plaintiff, and reached by the tracks of the Nashville & Chattanooga Railroad, and not by those of the defendant. It appears that at this time the credit of the plaintiff was not considered good by the defendant, and for this reason the stone would not have been delivered upon his premises, where it might be unloaded by the plaintiff. The proof shows that the defendant company was ready to deliver

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the cars as plaintiff desired, provided its charges for freight and demurrage were paid. The cars were placed near by the premises of plaintiff, but on those of defendant, but were ready and conveniently placed to be delivered when the charges should be paid.

The Court charged that when the company received this stone for transportation it did so upon the terms and stipulations of the bill of lading; that it was incumbent upon it to transfer it to its yards in Nashville at a place convenient for delivery to the plaintiff at the point he desired to receive it, and that it was not incumbent upon defendants to place it on plaintiff's side track and on his premises until all proper charges were paid; that due notice of arrival should be given, and that the rights of the parties would be governed by the terms of the bill of lading.

This charge is objected to, and special requests were made, the ground or basis of all of which is that it was incumbent on the defendant road to place the cars upon the side track running into plaintiff's yard at the usual place of delivery and unloading, and until it did so, it could claim neither freight nor demurrage. This is practically all that is involved in the case.

We are of opinion the Circuit Judge was correct, and that the assignments of error are not well made.

The defendant company could not be required

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to part with the possession and control of the property until its legitimate charges were paid; and to have placed it on the plaintiff's premises where he could unload it as he saw proper, and when he pleased, was virtually to part with possession and to surrender its lien for freight and other charges. The lien existed for demurrage in this case by the express terms of the bill of lading. It was held in the case of *Railroad v. Hunt*, 15 Lea, 261, that in the absence of contract a railroad could not claim a lien for demurrage charges, so that the Hunt case is not applicable, and the only question that could arise is whether such a stipulation in a contract is a reasonable one such as the Courts will enforce.

A mere statement of the proposition carries with it an answer. If a road cannot make a reasonable charge for detention of its cars by consignees, it is evident that such consignees may delay unloading until virtually the entire rolling stock of the road may be tied up, and its tracks obstructed by loaded cars, awaiting the pleasure or convenience of consignees.

We can see no reason why carriers should not be entitled to reasonable compensation for the unreasonable delay and detention of their cars by consignees (4 Elliot on Railroads, Sec. 1567; *Miller v. Georgia Railroad Co.*, 18 L. R. A., 323); nor to a lien for such charges when such lien

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is agreed to and stipulated for in the bill of lading. There is no complaint that the amount of charges is unreasonable.

We see no error in the judgment of the Court below, and it is affirmed with costs.

Ferguson v. Phoenix Cotton Mills.

FERGUSON v. PHOENIX COTTON MILLS.

(Nashville. January 12, 1901.)

1. MASTER AND SERVANT. *Master not required to warn servant of obvious danger.*

The rule is that if the danger is obvious, and the servant has sufficient discretion and opportunity to avoid it, the master cannot be held for injury to the servant, although he did not warn him of the danger. (*Post*, p. 239.)

Case cited: *Brown v. Electric Ry.*, 101 Tenn., 255.

2. SAME. *Master not required to prove servant's knowledge of obvious danger.*

The burden is not upon the master to prove that the servant had actual knowledge of an obvious defect or danger. Knowledge is imputed to the servant in such case. (*Post*, pp. 239, 240.)

Case cited: *Brown v. Electric Ry.*, 101 Tenn., 255.

3. SAME. *Servant required to exercise reasonable care and diligence.*

If the servant might have averted injury by the exercise of reasonable care and diligence, the master is not liable. (*Post*, p. 240.)

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. JOHN W. CHILDRESS, J.

E. S. ASHCRAFT for Ferguson.

STITH M. CAIN for Phoenix Cotton Mills.

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WILKES, J. This is an action for damages for personal injuries. The plaintiff was employed as a laborer in the defendant mills. It was one of his duties to remove wet cotton packed in a large box placed on a four-wheeled truck, from one kettle or vat to another, the distance being some fifty feet. He alleges that through defective construction of the floor, and the presence of a hole in it, he was injured by one of the wheels of the truck falling into the hole. The plaintiff, with another, tried to lift the truck out of the hole, and his contention is that he was ruptured either by the strain of lifting or by coming in contact with the bed of the box while pushing it on the truck, when it fell into the hole, he being behind it.

The plaintiff had been at work in the mill for only five days; he had been given no notice or warning concerning the hole by any one connected with the factory, and had never lifted one of the boxes, and did not know its weight. The hole was not in the direct line the trucks were usually moved, but to one side, caused by warp boxes standing in the direct line, as was frequently the case, while the mill was in operation. At the point where the trucks were rolled around the warp boxes there were pulleys and belts overhead, which would require some care to be used by a person passing under them. The holes in the floor were necessary for drainage.

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There was a verdict for the defendant, and the plaintiff has appealed and assigned errors.

The first four errors are that the Court failed to charge certain specific requests. These requests are not set out in the bill of exceptions. It appears that they were intended to be set out, and blank space appears in the transcript for them, but they are not inserted or copied. They are, however, inserted in the motion for a new trial, and the requests present virtually the same features of objection as are made to the charge itself.

The first assignment is specifically that the plaintiff was not cautioned as to the danger of this hole in the floor.

The second is that it was not stated to the jury that the burden of the proof was on the defendant to show that plaintiff had knowledge of the hole.

The third is that it was error not to charge that the duty of inspection was greater in the case of the master than of the (plaintiff) servant.

The fourth is that if the defect was patent, still if the plaintiff was inexperienced, it was the duty of the defendant to instruct and warn him.

The sixth assignment complaining of error in the charges given embraces the same feature of the duty to instruct an inexperienced employee.

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The seventh assignment complains that it was error to say that if the hole could have been seen or known of by the plaintiff by the exercise of ordinary care and prudence on his part, then there would be no liability.

The eighth is as to the charge of the Court that the plaintiff must use ordinary diligence and be reasonably vigilant.

These assignments may all be grouped and treated together. There is no allegation that plaintiff did not have ordinary intelligence. We think from this record that if there was any defect that was dangerous, which is very doubtful, it was patent and obvious. The rule is that if the danger is obvious, and the servant has sufficient discretion and opportunity to see and avoid it, the master cannot be held for any injury to the servant, although he did not warn him of the danger. Woods' Law of Master and Servant, Sec. 349; *Brown v. Electric Railway Co.*, 101 Tenn., 255.

It was not incumbent on the defendant to prove that the plaintiff had knowledge of a defect which was plain and obvious, nor was it incumbent upon the defendant to prove the condition when it was obvious. It does not require experience to see a hole in the floor, and as these were necessary for the drainage of the floor, it was one of the risks that plaintiff assumed, and was so simple and obvious that experience

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was not an element to be considered in determining the question of liability, nor was it such as was incumbent on the defendant to instruct about. Bigelow on Torts, pages 331, 332; *Brown v. Electric Railway*, 17 Pick., 255.

So, also, the rule is well settled that if an accident and injury might have been prevented by the use of reasonable care and diligence, there is no ground of liability. Woods' Law of Master and Servant, Sec. 328.

If the wheel of the truck had gone into the hole, and it was the duty of the employee to lift it out, then he cannot hold the master liable for overexerting and straining himself. He is the best judge of his own lifting capacity, and the risk is upon him not to overtax it. If it was not his duty to lift the truck out, and he did it without an order from his employer, the latter would not be liable. Hale on Torts, page 516; *Knox v. Pioneer Coal Co.*, 90 Tenn., 547.

There is no assignment that there is no evidence to support the verdict. Such an assignment would not hold good, as there is grave doubt whether the plaintiff was injured by the accident or whether his trouble was not caused by other things, or constitutional. In argument it was stated that the light at the place of the accident was not good, and that the plaintiff in his stooping posture under the pulleys overhead could not protect himself properly against the hole, but these

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are exceptions which would properly be raised under an assignment of no evidence to support the verdict. Besides, we do not think they are supported by the record.

There is no error in the judgment of the Court below, and it is affirmed with costs.

Utley v. Railroad.

UTLEY v. RAILROAD.

(*Nashville.* January 12, 1901.)

PLEADING AND PRACTICE. *Issue narrowed by statement of parties.*

Where, on the trial in the Circuit Court of an appealed case, commenced by Justice's warrant describing the cause of action in general terms as "a plea of debt due by damages," the parties, in response to an inquiry of the Court, make statement of the matter in controversy, the plaintiff stating that he sued for the wrongful killing of a horse by the defendant's moving train, and the defendant stating that its defense was that it had observed all statutory precautions, all facts not put in issue by this statement will be treated as admitted, and the plaintiff is entitled to recover, if defendant fails to prove its defense, without other proof than that of value of the animal.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

PARDUE & BASS for Utley.

SMITH & MADDIN for Railroad.

WILKES, J. This is an action commenced before a Justice of the Peace. The warrant states the cause of action as follows: "To answer the

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complaint of Lem Utley in a plea of debt due by damages" (killing a horse).

In the Circuit Court, on appeal, the cause was heard before the Court and a jury, and at the close of plaintiff's evidence it was demurred to, and issue was joined on the demurrer, and it was sustained and suit dismissed, and the plaintiff has appealed and assigned errors.

The bill of exceptions states that after the jury had been regularly impaneled and sworn to try the matters in controversy, the plaintiff, in response to an inquiry by the Court, said in the presence of the Court and jury that his cause of action was for the wrongful killing of plaintiff's horse by one of defendant's moving trains.

Thereupon attorney for defendant, in response to an inquiry from the Court, stated that his defense was, that defendant had observed the precautions required by the statute. The plaintiff then introduced two witnesses who testified to substantially the same facts, as follows: That plaintiff lived at Goodlettsville, Tennessee, about 600 feet from the depot, at a place where the public road crosses the railroad. This public road is a turnpike going from Goodlettsville to Gallatin. It crosses the railroad track running north and south; that plaintiff lives on the west side of the railroad and on the north side of the turnpike. One of the side tracks comes down to within a short distance of the turnpike crossing; that

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plaintiff was absent from home when his horse was killed, but on his return found him lying dead in a field just south of the turnpike crossing, and on the east side of the track; that the horse was killed December 18, 1898.

There is a cattle guard at the south side of the turnpike, where the railroad crosses it, and the horse was found dead beyond this cattle guard. The horse was worth \$70. Plaintiff did not see the accident, nor know of it until he returned home. He turned the horse out to graze that morning. Plaintiff was in the habit of turning his horses out on the commons when not in use. The stable is just back of the house, and towards the depot. The horse was fifty or sixty feet from the fence, and south of the turnpike, and a few feet from the railroad track, lying in the ditch.

Mr. Reed, the section foreman, went with plaintiff to see the horse. Isaac Drake and plaintiff's brother, John Utley, also saw him.

Plaintiff told Mr. Reed, the section foreman, that in order to settle the matter he could report the horse as worth \$45 to the company. He agreed to Mr. Reed's valuation, thinking he would get his money right away, without any trouble. Horse was fifteen hands high, gentle, sound, and all right. In substance, this was all the evidence.

It is insisted on the part of the defendant, railroad company, that this evidence does not make out a case of liability on the part of the rail-

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road company, in other words, that the evidence does not go far enough; that the plaintiff's proof fails to show how the horse was killed, or the nature of his injuries, if he had any, or that it was the defendant's railroad that passed by the place of the killing, or that any trains passed over it, or that the horse was struck by the train; that it is not shown that the track was unfenced where the horse was killed, or where it may have entered on the track; that the proof does not show that Reed, the section foreman, who valued the horse, was foreman of defendant's road.

It is insisted on the plaintiff's part that the controverted questions in the case were narrowed, by the statements of counsel, to the simple question presented by the defendant's statement. In other words, that when the plaintiff said his cause of action was the wrongful killing of plaintiff's horse by one of defendant's moving trains, and the defendant replied that its defense was that it had observed all statutory precautions, it was an admission on the defendant's part that one of its moving trains had killed the plaintiff's horse, and the only matter in issue left was whether the killing was wrongful, and this defendant denied by stating that it had observed the statutory precautions. The insistence is, that the case having originated before a Justice of the Peace, where there were no formal pleadings, the agreement

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became a substitute for and stood in the place of such pleadings, and subject to the rules governing pleadings in other cases; that plaintiff's statement was his declaration, and defendant's counter statement was his plea. Under such circumstances, and in such cases, the provisions of the Code, § 4631, it is insisted, apply that all allegations in the declaration not denied in the plea shall be taken as true for all the purposes of that issue, and the familiar doctrine applies, as in pleadings in other law cases, that what is alleged in the declaration, and not denied by the plea, is conceded to be true. There is no statutory provision to the effect that in cases appealed from a Justice of the Peace, on hearing in the Circuit Court the trial Judge may compel the parties to state their contention, but it is certainly an excellent practice, and where the requests are assented to by both parties the cause will be treated as submitted on the issues made by the statements. It is helpful alike to the Court, the jury, the attorneys and litigants that the issues shall be thus stated, in order that the scope and extent of the controversy may be known and announced, and the evidence limited to matters which are in dispute.

The statements having been made, the controverted facts must be treated as being embraced in and bounded by the limits of the statements, and

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it is wholly unnecessary to introduce evidence beyond the facts which are controverted.

It is said by counsel for defendant that neither Court nor counsel considered the statements as constituting pleadings in the case, and subject to the rules of pleading, and that this is evidenced by the fact that the plaintiff, notwithstanding the statements, proceeded to introduce evidence on many features that were conceded by the statement of defense, treating it as a pleading. It is true that some evidence in this case was introduced by the plaintiff, which was wholly unnecessary, but if this be conceded, it does not vary the rule, but the unnecessary evidence may be treated as immaterial.

Indeed, on the part of plaintiff there was but little, if any, necessity for introducing any proof except as to value. The ownership was not denied, and must be considered as conceded. The killing by defendant's train was not denied, and must be treated as admitted, and by the shape of the defendant's statement it must be inferred that under the circumstances of the killing it was necessary to observe some statutory precautions, and that they were observed is alleged as an excuse for the killing, and a reason why no liability should attach.

To allow a different holding of the case would operate as a surprise and hardship on the plaintiff. The cause has been heard in this Court at

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a former term, when the facts were fully developed, and the cause was reversed and remanded for an error in the charge of the Court. It is evident that upon this latter trial the plaintiff did not attempt to fully develop and present the facts in the cause, and this was evidently upon the impression that the issues had been narrowed down and confined to the matters presented by the statements of counsel.

We are of opinion that in this view of the case the Court below was in error in sustaining the demurrer, there being sufficient evidence to fix a liability on the road and no proof that any statutory precautions were observed which would relieve the defendant therefrom, and that being, in our opinion, the only matter of controversy left open by the statements, the judgment of the Court below must be reversed, and the cause remanded for an assignment of damages on the evidence, unless the parties shall agree upon the same, and in that event final judgment will be rendered here.

The defendant will pay all costs.

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BALCH v. JOHNSON.

(*Nashville*. January 19, 1901.)

1. **ADOPTION.** *Adopted child is not a "bodily heir" of the adopting parent.*

An adopted child does not take under a deed to the "bodily heirs" of the adopting parent. (*Post*, p. 253.)

2. **SAME.** *Married woman may join her husband in adoption of child.*

A married woman, acting conjointly with her husband, may validly adopt a child. (*Post*, pp. 254-256.)

Code construed: § 5409 (S.); § 4388 (M. & V.); § 3643 (T. & S.).

3. **DEED.** *Bodily heirs.*

A deed that conveys real estate to a party and his "bodily heirs" creates an estate tail, which is converted by statute into a fee. (*Post*, p. 253.)

Case cited: *Middleton v. Smith*, 1 Cold., 144.

4. **SAME.** *Creates a vested, transmissible remainder, when.*

A deed that conveys real estate to a wife for life, with remainder to the "bodily heirs" of the husband and a step-child by name, creates in the latter a vested, transmissible remainder, which opens up to let in after-born "bodily heirs" of the husband. (*Post*, p. 254.)

Cases cited: *Bridgewater v. Gordon*, 2 Sneed, 5; *Harris v. Alderson*, 4 Sneed, 250; *McClung v. McMillan*, 1 Heis., 655; *Cathy v. Cathy*, 9 Hum., 470; *Puryear v. Edmundson*, 4 Heis., 43; *Whitman v. Young*, 1 Tenn. Chy., 586.

5. **CODE.** *Construction of.*

In construing the provisions of the Code the original statutes from which it was compiled may be looked to, and it is expressly provided therein that "words importing the masculine gender include the feminine and neuter." (*Post*, pp. 255, 256.)

Code construed: § 62 (S.); § 48 (M. & V.); § 50 (T. & S.).

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Cases cited: *Bates v. Sullivan*, 3 Head, 633; *Tennessee Hospital v. Fuqua*, 1 Lea, 611; *Turnpike Co. v. Davidson County*, 14 Lea, 73.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. COK, Ch.

NOAH W. COOPER for Balch.

JAMES TRIMBLE and HAMILTON PARKS for Johnson.

BEARD, J. This cause involves a question as to the ownership of a house and lot in the town of Goodlettsville. On the nineteenth of May, 1866, the then owner of this property, one Cummings, conveyed it by deed to Julia Johnson, wife of Andrew Johnson, for life, with remainder over, in the following terms: "To Mrs. Julia Johnson, wife of Andrew Johnson, Jr., during her lifetime, and at her death to the bodily heirs of said Andrew Johnson, including Ellen Evers, step-daughter of Andrew Johnson, Jr.," etc.

The Ellen Evers mentioned in this clause was a daughter of the conveyee Julia by a former marriage, who, though then living, died subsequently, while still young, without issue and intestate. After her death Andrew Johnson and

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Julia, his wife, made application to the County Court of Davidson County for permission to adopt the complainant, Annitta, as their child, and by a judgment of that Court, duly entered, this application was granted. No question is now made upon this proceeding. It is conceded to have conformed to the statute providing for adoption, and to have created the legal relation of an adopting father and adopted child as between Andrew Johnson and Annitta. It is insisted, however, by the defendants that it had no such effect as between Julia Johnson and Annitta.

In 1884 Julia Johnson died, having never had born to her any other child than Ellen. After the death of Julia, Andrew, her surviving husband, joining with one Bradley, a surviving brother of Julia, executed and delivered a deed to the defendant, Josephine Johnson, by which they conveyed, or assumed to convey, to her the property in question. Under this deed the conveyee entered into and was holding possession at the time of the institution of this suit. The complainant, Annitta, claiming ownership, filed the present bill, asking that this deed be canceled as a cloud upon her title, and that she be placed in possession of the house and lot.

This claim of complainant is rested upon two grounds. First, that as the result of the adoption proceedings she was placed in the class of remaindermen provided for in the Cummings deed—

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that is, she had become a "bodily heir" of Andrew Johnson, and being the only such heir, took the whole estate at the death of Julia, and, if wrong in this, then, second, she insists that this deed created in Ella Evers a vested, transmissible remainder interest, which, when she died intestate and without issue, passed to her mother, Julia, and upon the death of the latter to complainant as her child and heir by adoption.

These claims are controverted by the defendant as unsound in law, and, in addition, they plead that in a former suit instituted in a Court of competent jurisdiction, to which complainant, Annitta, was a party, and in which the same questions were presented as in the present bill, it was decreed complainant had no interest in this property, and that decree is relied upon as an estoppel in this case. Adverse possession of seven years is also set up as a defense.

In the progress of the cause a jury was demanded, and issues were prepared, but the Chancellor refused a jury and dismissed the bill upon two grounds. First, that complainant, Annitta, took nothing under the deed, as she was not a bodily heir of Andrew Johnson, and, second, that she took nothing by descent from Julia Johnson, because the latter, being a married woman, lacked legal capacity to avail herself of our statute providing for adoption. From this action the complainant appealed. The Court of Chancery Appeals

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disagreeing with the Chancellor as to the latter ground, reversed his decree of dismissal and has remanded the case in order to a trial of the issues raised by the plea of *res adjudicata*.

The decree of the latter Court is now complained of by the defendant.

We are satisfied that complainant, Annitta, does not fall within the class of remaindermen provided for in the Cummings deed. The effect of the act of adoption, so far as Andrew Johnson and Annitta are concerned, was to confer upon her "all the privileges of a legitimate child," so far as he was concerned, "with capacity to inherit and succeed" to his real and personal estate as heir and next of kin, but it did not, and, in the nature of things could not, make her a "bodily heir." These terms, thus used in the deed, are the exact equivalent of the words "heirs of the body," and have been held to make an estate tail, which under the statute is converted into an estate in fee. *Middleton v. Smith*, 1 Cold., 144. As was said in *Commonwealth v. Nancrede*, 8 Casey (Pa.), 389, "giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law only to give the right to inherit;" or as the Court said in *Shafer v. Enew*, 54 Pa., 304, "the right to inherit from the adopting parent is made complete, but the identity of the child remains. One adopted has the right of a child without being

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a child." So in the latter case it was held that adopted children could not take under a devise to trustees for the sole and separate use of a married woman for life, and on her death the property to be conveyed to her children and the heirs of her children forever. Like limitations have been imposed upon the rights of children by adoption in *Russell v. Russell*, 84 Ala., 48; *Bondlear v. Bondlear*, 112 Mass., 184; *Wyeth v. Stone*, 144 Mass., 441; *Jenkins v. Jenkins*, 64 N. H., 407. All these cases involved questions very similar to the one at bar.

2. We are equally satisfied that the deed created a vested, transmissible remainder in Ellen Evers, which, by operation of law, would open up so as to let in after born "bodily heirs" of Andrew Johnson, Jr. (Tiedeman on Real Prop., Sec. 402; Wash. on Real Prop., Vol. 2, p. 511; *Bridge-water v. Gordon*, 2 Sneed, 5; *Harris v. Alderson*, 4 Sneed, 250; *McClung v. McMillan*, 1 Heis., 655; *Cathy v. Cathy*, 9 Hum., 470; *Puryear v. Edmondson*, 4 Heis., 43; *Whitman v. Young*, 1 Tenn. Chy., 586; *Havergal v. Harrison*, 7 Beavan, 49), and that upon the death of Ellen intestate and without issue, and also without brothers and sisters or their issue, her interest in the property passed to her mother, and upon the latter's death, under the laws of descent, to complainant, Annitta, if as a matter of law she was adopted by Julia Johnson. The question then is, under our statute,

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Can a married woman, joining with her husband, legally adopt a child?

The (Shannon's) Code, § 5409, providing for adoption, is as follows: "Any person wishing to adopt another as his child, shall apply by petition, . . . setting forth the reasons therefor, and the terms of the aforesaid adoption." This section is taken from Section 2 of Chapter 338 of the Acts of 1851-52, in which it is provided that the County or Circuit Courts "shall have concurrent jurisdiction and power to authorize any person to adopt any child or children as their own, upon application or petition."

In the original Act, as well as in the Code section, it will be observed that this right to resort to the Courts for the purpose of being empowered to adopt another is conferred on "any person." Under the broad power thus given no reason in public policy, or resting on any sound rule of construction, has been suggested why a married woman, acting conjointly with her husband, should be deprived of the benefit of this provision. It is true that in the Code the masculine pronoun "his" is used, but we do not think that by so doing the Legislature intended to make a departure from the liberal scheme provided in the original Act, within the general and literal terms of which married women were included.

Not only is it well settled that in construing the sections of the Code the original Acts from

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which these sections are taken may be looked to for guidance (*Bates v. Sullivan*, 3 Head, 633; *Tennessee Hospital v. Fuqua*, 1 Lea, 611; *White's Creek Turnpike Co. v. Davidson County*, 14 Lea, 73), but it is expressly provided that "words importing the masculine gender include the feminine and neuter." Chap. 1, Art. 3, Sec. 62 of the (Shannon's) Code.

In addition, under such a construction, a wise policy is subserved. The purpose of the statute was to give the sanction of the law to the formation of new family relations between persons not necessarily of the same blood, in which the interests as well as the feelings of the husband and wife are intimately involved, and there is therefore manifest propriety in the wife uniting with her husband, as by so doing the adopted child is made to assume the same relation to her as to her husband, and occupies, "in a general sense, the same position in the family which it would if it were the natural child of both, born in lawful wedlock." This view, in construing statutes very similar, has been expressed by the Supreme Court of Indiana in *King v. Davis*, 87 Ind., 590; *Markam v. Krauss*, 133 Ind., 294, and by that of California in *Estate of Williams*, 102 Cal., 70.

We therefore agree with the Court of Chancery Appeals in its conclusion that the effect of the adoption proceedings instituted by Mr. and Mrs.

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Johnson was to make the complainant, Annitta, for the purpose of inheritance form them, the child of each and both, and that upon the death of Andrew Johnson, "without bodily heirs," she became entitled to the whole estate. This being so, it follows that she has a right to maintain this bill, unless it be that she is estopped by the decree set up as a bar against her by the defendants, or is precluded by some other act which would constitute a sufficient defense thereto. These matters of defense the parties have a right to have submitted to a jury, as was demanded in the Court below, upon issues properly framed.

To this end the cause was remanded by the Court of Chancery Appeals, and the decree of that Court is in all things affirmed.

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TURNPIKE CO. v. DAVIDSON COUNTY.

(*Nashville.* January 19, 1901.)

1. **TURNPIKE COMPANIES.** *Charter provision granting exclusive privilege sustained.*

A provision in the charter of a turnpike company "that it shall not be lawful to open or establish any other road so near as to injure or prejudice the interest of" said company, is not void or unenforceable by reason of vagueness or uncertainty. (*Post*, pp. 261, 263, 267.)

Acts construed: Acts 1830, Ch. —; Acts 1831, Ch. 46.

Cases cited: *State v. Turnpike Co.*, 2 Sneed, 90; *Talmage v. Transportation Co.*, 3 Head, 338; *Memphis, etc., Co. v. Williamson*, 9 Heis., 326; *Turnpike Co. v. Montgomery County*, 100 Tenn., 417.

2. **SAME.** *Same.*

And such provision in the charter of a turnpike company, granted by statute prior to Constitution of 1870, constitutes an inviolable contract. (*Post*, p. 262.)

Case cited: *Railroad v. Hicks*, 9 Bax., 442.

3. **SAME.** *Condemnation of their exclusive charter rights for public benefit.*

The exclusive right of a turnpike company secured by its charter may be condemned and taken for the public use and benefit, upon just compensation being made therefor. (*Post*, p. 267.)

Case cited: *Turnpike Co. v. Montgomery County*, 100 Tenn., 425.

4. **CORPORATIONS.** *Construction of charter.*

Doctrine reaffirmed that, in the construction of charters of incorporation granted by legislative act, nothing shall be taken or conceded, as against the State or public, in favor of the corporation but what is given in unmistakeable terms or by an implication as clear. (*Post*, pp. 262, 263.)

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Cases cited: *State v. Turnpike Co.*, 2 Sneed, 90; *Talmage v. Transportation Co.*, 3 Head, 338; *Memphis, etc., Co. v. Williamson*, 9 Heis., 327; *Turnpike Co. v. Montgomery County*, 100 Tenn., 417.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. Cook, Ch.

JOHN J. VERTREES, PARKS & HARWOOD for
Turnpike Co.

J. A. CARTWRIGHT for Davidson County.

WILKES, J. This is a bill by the turnpike company to enjoin the county of Davidson from opening and building a public road near Nashville, to be called Arlington Avenue.

The road, as projected, is about one-half a mile long, and extends from a point on the company's pike just beyond its first tollgate in an oblique or diagonal direction to the Stone's River or Chicken pike near the southeast corner of Mount Olivet Cemetery. The road simply extends from the one pike to the other, and not beyond either, in either direction. The theory of the bill, and ground of complaint, is that the proposed road will be used and will operate as a shunpike, whereby payment of tolls will be avoided

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at its first and most valuable and important toll-gate. But if not, technically speaking, a shun pike, still the turnpike company, has a right to prevent the opening of the road because it violates a provision of its charter, and injures or destroys an exclusive right which the charter of the turnpike company confers upon it.

The Chancellor held against the complainant company, and denied it any relief, and dismissed its bill, and the company appealed.

The Court of Chancery Appeals reached the same result as the Chancellor, but upon different grounds, and the complainant has appealed to this Court and assigned errors.

The case, as it comes to this Court, depends upon the validity of the charter provision, and its proper construction and interpretation.

The Court of Chancery Appeals report as facts that the proposed road, if opened, would be a great public convenience, and that it was not designed or intended as a shun pike for the purpose of depriving complainant company of its tolls, but from a sincere purpose to subserve the public convenience, but that it will materially injure the plaintiff, inasmuch as it will be used by a large number of people as a way of getting into the city of Nashville and leaving it, without having to pay toll at gate No. 1 upon complainant's road, and this damage is estimated at from \$500 to \$1,500 per annum. It is not insisted that

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outside and independent of the charter provision referred to the complainant could prevent the building of this road, so that we pass at once to the consideration of this feature of the case, inasmuch as complainant now bases his right to the relief prayed for upon the provision in the charter. Upon this point see the case of *Turnpike Co. v. Davidson County*, 7 Pickle, 291; *Turnpike Co. v. Montgomery County*, 16 Pickle, 417.

The complainant company was chartered in 1831 under Chapter 46, Acts of that year, and was organized and has been operated under that charter ever since. That Act gives to the company all the rights, privileges, and immunities which had previously been conferred by the Acts of January 4, 1830, upon a turnpike to be built from Nashville to Murfreesboro, and it is in this latter charter that the provision in question is found, at Sections 7 and 8. Section 7 is as follows: "That it shall not be lawful to open or establish any other road so near as to injure or prejudice the interest of the said Nashville & Murfreesboro Turnpike Co."

Section 8 provides that the rights, privileges, and immunities granted to the original members or stockholders of the company should pass to and vest in their successors. This is all that is necessary to set out of the charter, and conceding, as found by the Court of Chancery Appeals, that the present company is entitled to all the rights,

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privileges, and immunities of the original company, the question recurs, Is the complainant company, by virtue of these charter provisions, entitled to enjoin the opening and use of this road as projected?

It is not necessary to give any technical definition of the terms rights and privileges and immunities, as used in the charter. It is sufficient to say that under these terms are embraced such things as are valuable to the company in the exercise of the franchises conferred upon it. There can be no serious doubt but that the Legislature could grant to the complainant company such a right, privilege, or immunity as is contained in this Act. *Railroad Co. v. Hicks*, 9 Bax., 442; *Binghamton Bridge*, 3 Wallace, 51, 77; *Humphreys v. Piques*, 16 Wallace, 244. Nor can there be any serious doubt but that upon the acceptance of a charter with such provisions it became a contract between the State and the complainant company, which, under Section 10, Article 1, of the Federal Constitution, would become inviolable. As to what will be the ultimate effect or result of this holding we will consider further on.

We are now considering the question of the validity and proper construction of the provision.

The Court of Chancery Appeals was of opinion it was not sufficiently definite to found a right in complainant to the relief asked in this case, and that Court cites and relies in its holding

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upon principles announced in the following, among other cases: *State v. C. & R. T. P. Co.*, 2 Sneed, 90; *Talmage v. N. A. C. & Tr. Co.*, 3 Head, 338; *Memphis Gayoso Gas Co. v. Williamson*, 9 Heis., 326; *Turnpike Co. v. Montgomery County*, 16 Pickle, 417-421.

In the first of these cases it is said "nothing passes against the State or public by implication."

In the case last cited it is said: "Nothing is taken or conceded to a corporation, but what is given in unmistakable terms or by an implication equally clear." And again, "The contract, to be effective, must be clearly expressed in the charter." Page 421. To the same effect see, also, *Vicksburg Railroad Co. v. Dennis*, 116 U. S., 665; *Slidell v. Grandjean*, 111 U. S., 412.

The correctness of this holding we are not disposed to question, but readily approve.

The Court of Chancery Appeals was of opinion that the charter provision was indefinite, in that it did not define the territorial limits or distance within which the road should not be constructed, and bearing upon this feature of the case the Court of Chancery Appeals cite the cases of *Enfield I. B. Co. v. Hartford Railroad Co.*, 17 Conn., 40 (42 Am. Dec., 716); *Piscatequa Bridge v. N. H. Bridge et als.*, 7 New Hampshire, 35; *Bridge Properties v. Hoboken Co.*, 1 Wall., 116; *Binghampton Bridge*, 3 Wall., 51, as illustrating

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its position and ruling, and as indicating the proper mode and degree of definiteness requisite to create an exclusive right or franchise. The substance of the position taken by the Court is that if the provision were that no other road, parallel or practically parallel to the complainant's line, could be opened within any given distance—as, for instance, a mile or five miles or any other designated distance—that would be valid and definite. We are unable to agree with the Court of Chancery Appeals in their view of this matter. We cannot see that the fixing of exact distances or territorial limits is any more definite provision than the one incorporated in this charter. It is quite possible that the opening of a new road parallel to complainant's road, and within one mile or five miles of it, would not in any way injure complainant's road, and yet this is the test applied by that Court. It is certainly better that upon the question of opening a public road the test should be the necessity and convenience of the road on the one hand and the injury to the existing road upon the other. The public is certainly entitled to all the roads necessary for its use, and the complainant should not complain, no matter how near they were constructed to his road, if they did not injure it.

It is true that in the cases cited by the Court of Chancery Appeals the question is made to turn upon the matter of distance or territorial

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limit, but this was because of the provisions of the charters which were under consideration, and which prescribe territorial limits. It does not necessarily follow that charters which do not fix such limits or zones are indefinite. In either case the question is one of proof—in the one case as to distance, in the other as to injury. The latter may not be as readily ascertained as the former, and by the same means of survey, but injury is susceptible of proof equally as is distance. Now, in the present case the Court of Chancery Appeals has found that the new or proposed road is one of public convenience, but not one of public necessity, and that it will materially injure the complainant's road.

The vague and indeterminate conditions which the Court of Chancery Appeals imputes to the terms of the charter do not relate to it, but if they exist at all, pertain to the proof that must be made. Proof must be made in either case, and it may and probably would be harder to make in the one case than in the other. We have constant questions arising in the Courts of "reasonable notice," "reasonable skill," "reasonable care," and "reasonable compensation," and while definite limits are not fixed in any of these cases, it does not follow that they are indefinite, since they are ascertainable by proper inquiry and judicial investigation. The charter provision is virtually as if it read, "No other road should be

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opened or established so near this road as to materially reduce its revenues within the judgment of a Court of competent jurisdiction," and the Act could not be classed as vague and indefinite under such a provision.

In the one case it must be shown that the road complained of is within a certain geographical distance or territorial zone, in the other that it is a material injury to the established road. In the one case the test is a physical, in the other a financial one.

We are of opinion that the Court of Chancery Appeals is in error in their view of the case, and that complainant is entitled to relief, and the question now to be considered is the character and extent of the relief that should be granted. Before passing to this, however, we refer to the contention made for the county that the charter had reference to a parallel road or one virtually parallel to the existing road, and therefore a competitor with it. But this contention is not supported by the language or reason of the Act. The critical question is not whether the new road is parallel or has the same trend or direction as the established road, for there might be such a road without injury to the established road, but the question is, Does the new road, as constructed or projected, injure or prejudice the interest of the old road? If it does, it is within the inhibition of the charter, no matter what its

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direction may be. As a matter of fact, however, the new road, when used in connection with the Chicken or Stone River pike, does make a line substantially parallel with the old road.

In the case of *Red River Bridge Co. v. Mayor and Aldermen of Clarksville* it was held that a grant by charter from the Legislature of an exclusive right to build a toll bridge within certain limits, although a contract, is such an exclusive right as must yield to the public interest, and the franchise acquired under it may be taken for the public use, upon just compensation being paid therefor, without violating said contract or impairing its obligation in the sense of the Constitution. This doctrine is recognized and approved in *Turnpike Co. v. Montgomery County*, 16 Pickle, 425, citing 6 Am. & Eng. Ency. Law, 545, 546; *Ayer v. Tuscaloosa Bridge Co.*, 27 Am. Dec., 655.

To the same effect are *Enfield Toll Bridge Co. v. Hartford Railroad Co.*, 17 Conn., 40 (42 Am. Dec., 716); *Piscatequa Bridge v. A. H. Bridge*, 7 New Hampshire, 85; *State v. Noyes*, 47 Mo., 189; *Mason & Harper Ferry Bridge Co.*, 17 W. Va., 396.

We are of opinion, therefore, that there is error in the decree of the Court of Chancery Appeals as herein indicated, and the decree of that Court is reversed and modified.

The cause is remanded to the Chancery Court

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of Davidson County for a reference and ascertainment of the compensation that should be paid to the complainant for opening this road, and when the amount is ascertained and paid, the county shall be entitled to open and operate the road, and until that time the injunction will remain in force.

The costs of the cause up to the present time will be paid by the county.

State, *ex rel.*, v. Hart.

106	269
116	155

STATE, *ex rel.*, v. HART.

(Nashville. January 19, 1901.)

MANDAMUS. *Defense not available.*

It is not an available defense to a proceeding by mandamus against a County Trustee, to compel him to pay a warrant drawn upon him for a debt whose justice and correctness is not questioned by a board of district school directors, that one of the directors was an alien, and incompetent to hold the office, and that another had vacated the office by removing from the district, leaving but one competent director. The action of the board is valid, in such case, as that of officers *de facto*, which cannot be attacked in such collateral manner.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
HON. H. H. COOK, Ch.

JAS. S. PILCHER and B. M. BINKLEY for State.

J. A. CARTWRIGHT and Jos. H. ACKLEN for
Hart.

WILKES, J. This case came up on argument with, and was treated as presenting the same questions involved in, the case of *State, ex rel. Burkhalter, v. Banks et al.*, and the two cases were heard to-

State, ex rel., v. Hart.

gether. We are of opinion they do not involve the same questions, though each case is somewhat dependent on the other.

The Court has already held in the first named case that the election of school directors for the twenty-third civil and school district of Davidson County was improperly and illegally held in May, and should, under the statutes, have been held in August, and that the persons chosen in May were not legally elected, and were not entitled to act as directors of that district.

The present case is an application for mandamus to compel the Trustee of Davidson County to pay a warrant, drawn upon the Trustee in favor of the relator, for \$15.00, by Banks, Walton, and Andrews, who claimed to be the legal directors for that district. They were elected in August, 1898, and in July, 1900, contracted with the relator to do certain repairs on the school building in that district, and on July 14, 1900, issued him the warrant in question in payment for his services.

The contention is that the directors, Banks, Walton, and Andrews, having been elected in August, 1898, their term of office would not in any event terminate until September 1, 1900, and not then unless their successors were legally elected and qualified. Their contention is, as we think, correct, if we consider the election of their successors in May as void, and they were qualified

State, *ex rel.*, v. Hart.

and authorized to act, all other questions being out of the way.

It is said, however, that Andrews is an alien, and incapable of holding the office; that Banks had moved out of the district, and thereby vacated his office.

It is a well established rule of law that if a person exercise the functions of a public office under color of right, and with the acquiescence of the public, he will be deemed an officer *de facto*, and his acts will protect third persons, even though he was not eligible to the office, or had legally forfeited it by removing from the county. Mechem on Public Officers, Sec. 320; Throop on Public Officers, Secs. 631-636.

And the acts of such an officer cannot be impeached collaterally, nor his title inquired into except in *quo warranto* proceedings instituted for that purpose. Mechem on Public Officers, Sec. 343; Throop on Public Officers, Secs. 631, 82.

Banks and Andrews were exercising the functions of the office under a previous valid election. Both were recognized as such officers by the County Superintendent of Public Schools, who, under the law, had the power to fill vacancies until the regular election. Here we have the unanimous action of the entire board—one, Walton, being without question *de jure* a director, and the other two, Banks and Andrews, *de facto*.

State, *ex rel.*, v. Hart.

officers, in a matter involving the rights of a third person.

No question is made about the justice or correctness of amount of the relator's demand, and the Court is of opinion it should be paid, and the decree of the Court of Chancery Appeals directing a mandamus to issue is affirmed.

 Oliver v. Nashville.

OLIVER v. NASHVILLE.

106	273
117	514
117	606

(Nashville. January 19, 1901.)

1. **NEW TRIAL.** *Objection to consideration of motion for, unavailing, when.*

Objection to consideration of motion for new trial on account of failure to enter the motion, with specification of causes upon the motion docket as required by rule of Court, is unavailing in this Court to prevent consideration of the motion, where it does not appear that any action was invoked upon such objection in the lower Court, and the record entry overruling the motion sets out fully the grounds upon which a new trial was sought. (*Post*, pp. 274-276.)

2. **CHARGE OF COURT.** *Requests.*

Although there is no express statement that requests for further instructions were presented after delivery of the general charge, it sufficiently appears that they were so presented, where they follow immediately after the general charge, and the Court indorsed upon them that they were declined because the propositions therein embodied had been sufficiently covered by the general charge. (*Post*, pp. 276, 277.)

3. **MUNICIPAL CORPORATIONS.** *Duty and liability as to streets.*

It is the duty of a city to keep its streets open and in proper and safe condition for their entire width; and for injuries resulting from defects in any part of its streets to persons using them with due and proper care the city is liable. (*Post*, pp. 277, 278.)

Cases cited: *State v. Barksdale*, 5 Hum., 154; *Nashville v. Brown*, 9 Heis., 2; *Niblett v. Nashville*, 12 Heis., 684; *Poole v. Jackson*, 93 Tenn., 67.

4. **SAME.** *Not liable for injury occurring on defective street by reason of injured party's fault.*

Although the street of a city on which a party is injured is defective, the city is not liable for the injury, where he could,

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by due care, have avoided injury from such defects, and brought the injury upon himself by his own reckless conduct. (*Post*, p. 278.)

5. SUPREME COURT. *Will not reverse for error in charge, when.*

This Court will not reverse for error in the charge where it is absolutely clear that a correct result has been reached, and that another trial with a correct charge could not change this result. (*Post*, pp. 278-281.)

Case cited: *Jones v. Telephone Co.*, 101 Tenn., 443.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. HON. J. W. BONNER, J.

WASHINGTON & ALLEN and W. M. PARHAM for Oliver.

E. A. PRICE and K. T. McCONNICO for City.

WILKES, J. This is an action for damages for personal injuries claimed to have been sustained by the plaintiff, a minor, on account of the defective and unsafe condition of one of the streets of the city.

There was a trial before the Court and a jury in the Court below, and a verdict and judgment for the defendant, and the plaintiff has appealed and assigned errors.

Two preliminary questions are raised against any consideration of the assignments. In the first

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place, it appears that there is a rule in the Court below that all motions for new trial, in both jury and nonjury cases, shall specify the errors claimed to have been committed on the trial, and the ground upon which the motion is based, which shall be entered upon the motion docket and copied upon the minutes as they appear of record in the Court. There was an entry upon the motion docket in substance as follows: "Plaintiff will move for a new trial on the grounds attached hereto." It is said in the argument, and the fact appears by affidavit in the bill of exceptions, that it is a common practice in the Court below to write out the grounds of motion upon a separate slip of paper and pin or attach such slip to the docket in connection with the entry, and they are frequently, for convenience of considering them, detached by counsel. It appears that the entry was made April 28, 1900, and the motion for new trial was heard 5th of May, 1900, and at that time a minute entry was made that the plaintiff had called up the motion for new trial for hearing on the 3d, upon the following grounds, setting out eight grounds, which were then copied on the minutes of the Court. It appears, therefore, that the grounds urged for a new trial were regularly argued before and considered by the Court on the motion for a new trial, and were regularly copied on the minutes. Counsel for the city objected to

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hearing the motion, but expressed a willingness for the motion to be heard on its merits, reserving the exception to the sufficiency of the motion, and to the power of the Court to hear the same upon the merits. The motion was then disposed of on its merits, and the exception which had been reserved was never acted upon, and there was no request for the ruling of the Court upon it. We think the objection made is more technical than meritorious. It is very evident that the Court considered the entire matter upon its merits, and that it had every opportunity to detect any error it may have committed.

In such case the defendant must be treated as having waived the formal technical objection made and to have consented to a hearing of the motion on the merits.

It is said in the next place that the special requests made do not, from the record, appear to have been made after the regular charge was delivered. It is true there is no express statement to that effect, but these requests follow immediately after the general charge, and the action of the Court shows quite clearly that they were made after the general charge, as in several instances the memorandum of the trial Judge is in substance, "declined, already charged in substance;" and again, "declined, charge sufficient." This assignment we do not consider as well made. The mere fact that the requests followed the charge

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without more would not be sufficient. Upon the merits of the case there is difficulty. It is objected that there is positive error in the charge of the Court, as follows:

"The plaintiff insists that Cherry street, at or about the point of the accident, was not kept open to its full width as located by maps and surveys, and that along its western side the cross-ties of a spur track of a steam railway projected over the line of the street, and that the ends of these ties were covered with sand or dirt, thus creating an embankment, rendering travel along the street unsafe.

"The Court instructs you that the city was not required by law to keep Cherry street open and reasonably safe for travel through its entire width as fixed by survey." Several requests were made bearing upon this feature of the case, and the real matter of contention is whether a city is obligated to keep its streets open and safe for their entire width or only so far as may be reasonably safe and sufficient for the usage of the public.

As a general statement of law we are of opinion that the city is obligated to keep its streets open and safe and in proper condition for their entire width, and any one injured upon any part of the street, by reason of its defective condition, is entitled to damages, provided, the party injured was without fault. *State v. Barksdale*, 5 Hum.,

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154; *Nashville v. Brown*, 9 Heis., 2; *Niblett v. Nashville*, 12 Heis., 684; *Poole v. Jackson*, 9 Pick., 67; Beach on Contributory Negligence, Sec. 244; 2 Thompson on Negligence, 769; 1 Sher. & Red. on Negligence, Sec. 352; Jones on Neg. Municipal Corp., Sec. 77; 24 Am. & Eng. Enc. Law, 108.

But on the other hand if the street be defective in some parts or portions, this would not warrant a person in negligently, heedlessly, or recklessly going upon the dangerous portions, especially when there was ample room which was safe, secure and accessible.

The whole of the charge of the Court must be considered together and with reference to the facts of the case, in order to determine whether it is correct or not. The Court charged the jury, in addition to what has been already stated, that, "if the space between the street railroad track, on the east, and the embankment on the west was of such width and in such condition as to be reasonably safe for persons exercising ordinary care, then the duty of the city was performed." The Court continued, "If by the exercise of ordinary care the plaintiff could with reasonable safety have driven along and through the space referred to, and through his own negligence and willingness drove upon the embankment already referred to, thus causing his wagon to be overturned, in such case you should find for the de-

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fendant, so far as this issue is concerned. On the other hand, if you find from the proof that the space between the street railway track on the east and the said embankment was not sufficiently wide for the passage with reasonable safety of vehicles whose drivers were exercising ordinary care; if you further find that defendant city knew of such defects, or might have known of them by the exercise of ordinary care, and had the opportunity to repair the defects and failed to do so, and this was the proximate, that is to say, the controlling and responsible cause of the accident—that is, the cause without which the accident would not have taken place—and you further find that at the time of the accident the plaintiff was exercising ordinary care for his own protection, in such case you should find for the plaintiff.”

The facts, as they appear from the weight of evidence, are that plaintiff was driving an express or transfer wagon, hauling passengers from the race track to the city. It appears that he had been drinking some and had been racing along the road with other vehicles, and that he turned out of a safe track upon the street across the street car tracks, in order to reach the space on the west side of the track, so that he might be enabled to distance and pass his competitors. He was driving quite rapidly at the time, and his wheels were caught by the street car track and

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thrown out of their proper line. As a consequence the wheels were thrown on the embankment, and the wagon was overthrown.

We think it appears that the plaintiff was driving not only negligently but rashly and recklessly at a high rate of speed, racing with other vehicles, and that his turning out of the safe track was in order that he might distance his competitors; that in consequence of this reckless driving and attempting to cross the street car track, his wagon was deflected and overturned, and that his recklessness and negligence was the cause of his own accident and injury.

It fully appears that he could, with the exercise of reasonable care and caution, have driven along the west side of the street. While it is the duty of the city, as we think, to keep its streets open and reasonably safe for their entire width, still, if there is a defect and danger in it, the city will not be liable for damages to one who heedlessly and recklessly runs into the danger, but only to those who inadvertently or ignorantly go into it, without fault on their part.

If a party intentionally and as a matter of choice or convenience leaves the usual and safe track, he cannot hold the city liable if he recklessly and needlessly goes into danger. Taking the charge as a whole, while it is, as we think, erroneous in the particular feature stated, we do not, under the facts of the case, consider such

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error as reversible, but we are strongly persuaded the merits of the case have been reached, and the case should not be reversed. *Jones v. Telephone Co.*, 17 Pick., 443. We think the evidence is overwhelming that the plaintiff was guilty of gross carelessness and recklessness, and that his injury is due to these causes, and upon a charge unexceptionable the same conclusion of nonliability on the part of the city must result.

The judgment of the Court below must therefore be affirmed with costs.

State v. Insurance Co.

STATE v. INSURANCE Co.

(Nashville. January 19, 1901.)

1. **TAXATION.** *Foreign life insurance company not liable for privilege tax, when.*

A foreign life insurance company that has, by the State's comity, engaged for a time in business within its borders, through local and resident agents, soliciting and taking policies from its citizens and collecting premiums thereon, may, by ceasing to solicit and take new policies and by recalling its agents from the State, thereby compelling the payment of premiums by mail or express to its office outside the State, evade the payment of the privilege tax of $2\frac{1}{4}$ per cent. on gross premium receipts imposed by statute on all foreign life insurance companies, and, at the same time continue its business by keeping alive all of its old policies taken originally by its resident agents, and by receiving and collecting through the public agencies of mail and carriers, the renewal premiums on such policies, in competition with other taxpaying companies, both foreign and domestic.

Cases cited: *Ins. Co. v. Ins. Co.*, 11 Hum., 25; *Dugger v. Ins. Co.*, 95 Tenn., 245; *Young v. Iron Co.*, 85 Tenn., 196; *Spratley v. Ins. Co.*, 99 Tenn., 322 (S. C., 172 U. S., 611.)

2. **SAME.** *Same. Case in judgment.*

The Connecticut Mutual Life Insurance Company, after having, by the State's comity, done business in the State for a time, ceased, on July 1, 1894, to solicit or take new policies, and recalled its resident agents. It then had 369 policies in force in the State, which its resident agents had secured. It kept these policies alive, collecting the renewal premiums by mail or express. After the recall of its agents and before institution of this suit, it had collected thereon \$134,526.96. If liable for the same tax— $2\frac{1}{4}$ per cent. on gross premium receipts—that other foreign companies paid, it owed the State \$3,363.17. The Court held the company was not liable.

106	282
117	44
117	49

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3. SAME. *Same. Construction of clause in revenue acts, relating to.*

The Court holds that the clause in the revenue Act of 1897, re-enacted in the revenue Act of 1899, providing that life insurance companies of other States and foreign countries ceasing to transact new business in the State shall continue to pay the tax of $2\frac{1}{2}$ per cent. on gross premium receipts that they may thereafter collect from business which they had secured while in the State, has no application to or does not reach this company, which had recalled its agents and ceased to take new business before the passage of these acts. It is not quite clear whether the Court intends to hold that the Legislature has not the constitutional power to pass a statute that would reach this company and others in like situation, or merely to decide that it has not done so.*

Acts construed: Acts 1897, Ch. 2; Acts 1899, Ch. 432.

4. INSURANCE, LIFE. *Payment of premium, where made.*

The Court holds that delivery of a letter or package, containing renewal premiums on a life policy, to a post office or carrier within the State, addressed to the company at a point outside the State, does not constitute delivery or payment of such renewal premium to the carrier within the State, and that such delivery and payment does not become complete and effective until actual receipt of the premiums by the company at its office, and that the money remains, in the meantime, at the risk of the sender.†

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County. HON. HENRY H. COOK, Ch.

*The Legislature, at its recent session, passed a statute which undertakes to remedy this injustice and hardship and to prevent the discrimination in favor of foreign as against taxpaying domestic companies, and the discrimination in favor of a retiring foreign company as against a foreign company that remains, which results from the present state of the law as declared in this case.—REPORTER.

†See on this point p. 317, post and note.—REPORTER.

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ATTORNEY-GENERAL PICKLE for State.

JOHN J. VERTREES and FRANCIS FENTRESS for Insurance Co.

WILKES, J. Prior to July, 1894, the Connecticut Mutual Life Insurance Company prosecuted its business of life insurance in the State of Tennessee through resident agents and local and general agencies. At that date it withdrew from the State, so far as soliciting or attempting to do any new business was concerned, leaving, however, quite a large number of policies in force.

From July, 1894, to July, 1899, it received from policy holders residing in Tennessee premiums aggregating \$137,384.47. Of this sum \$134,526.96 was collected on policies originally solicited and taken in the State, and \$2,857.50 on policies taken out originally in other States, and whose holders had subsequently moved to the State.

For many years the State has exacted of foreign insurance companies a privilege tax of "2½ per cent. of gross premium receipts, payable semi-annually, January and July." Acts 1893, Ch. 89, Sec. 6; Acts 1895, Ch. 160, Sec. 19; Acts 1897, Ch. 2, Sec. 5.

The tax, without interest, due on this volume of business is \$3,363.17 on policies taken originally in Tennessee, and \$71.43 on policies taken originally elsewhere.

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The defendant's contention is that it withdrew from the State and its jurisdiction in July, 1894; that it has not since been "doing business" in the State; and that it is therefore not liable to this tax.

What the defendant company did in 1894 was to recall its agents and agencies from the State, and cease to solicit and write new policies. It kept alive its existing policies by receiving premiums thereon as before, except that the money was sent by mail or otherwise to defendant's agents or agencies outside the State, and not paid to the company in the State.

The Chancellor was of opinion that the company was not liable for the tax, and so decreed, and the State has appealed and assigned as error this holding of the Chancellor.

The defendant company is a foreign corporation not engaged in interstate commerce, and it is conceded that the Legislature has power to prescribe the terms on which it may be permitted to do business in Tennessee. *Ins. Co. v. Ins. Co.*, 11 Hum., 25; *Dugger v. Ins. Co.*, 95 Tenn., 245; *Young v. Iron Co.*, 85 Tenn., 196.

The only question at issue is whether the company, under the facts in the case, after its withdrawal from the State in 1894, leaving a portion of its policies in force, was thereafter doing business in Tennessee, by receiving by its officers, in another State, through the mails and

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express, the accruing premiums on such policies.

It is insisted by the State that to allow an insurance company thus to continue its business by receiving the premiums would be an easy evasion of the law. It must be observed that the tax as laid is not a gross sum for doing business, but a tax upon the gross premiums received by the company.

These policies were all upon the usual plan; that is to say, the assured paid the first premium and received the policy. Such payment kept the policy in force for a year. It was the right and privilege of the policy holder to renew the policy for another year, by paying another premium. Such premium is known as a "renewal premium." It is optional with the assured to pay it, but obligatory upon the company to receive it. The company cannot compel the assured to pay a renewal premium, but he can compel the company to receive it, or, what is equivalent, keep the policy alive by tendering it.

When the company withdrew from Tennessee (July 1, 1894) there were 369 policy holders in the State (thirty-four of whom had been insured while citizens of other States) holding policies which provided, in terms, that all premiums should be paid at the company's home office, in Connecticut, unless, for the policy holder's convenience, it should, from time to time, be otherwise

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arranged. Many of these policies are still in force, but 104 have either matured or lapsed.

None of the premiums were, after withdrawal in 1894, received by the company in Tennessee, but were sent to it by mail or express to Kentucky, or the home office in Connecticut.

The Act of the General Assembly pertaining to foreign corporations refers, by its terms, to their admission, their retirement, and their exclusion. Section 9 of the Act, which provides for the exclusion of such corporations from the State, prescribes the manner in which it shall be done, and says, "Upon the doing of these acts the agents of the company are required to discontinue the issuing of any new policies or the collection of any premiums." It is argued, therefore, that the Act, by its terms, defines the "doing of business" to be the issuance of policies and collection of premiums in Tennessee, and it is also contended that neither of these things has been done since the withdrawal of the company.

We think it clear that a foreign insurance company which issues to a citizen of Tennessee a policy is not doing business in Tennessee if it receives the application in a foreign State, and without solicitation in Tennessee, and if it, in addition, executes and delivers the policy and receives the premiums in such foreign State. In such case there cannot be said to be any "doing of business" in Tennessee by the foreign corpora-

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tion that would subject it to tax. A tax in such cases would be invalid and such legislation would be unconstitutional and void. *Allgeyer v. Louisiana*, 165 U. S., 578; *Eastern B. & L. Assn. v. Bedford*, 88 Fed. Rep., 7.

It is insisted on behalf of the State that the present case is controlled by that of *Spratly v. Connecticut Mutual Life Ins. Co.*, 15 Pick., 322. In substance that case is this: Prior to 1894 the company, while doing business as a foreign insurance company in Tennessee, insured the life of B. R. Spratly, a citizen of Tennessee, upon an application made in Tennessee, and by a policy delivered in Tennessee. The company afterwards, on July 1, 1894, withdrew from the State. Mr. Spratly died in 1896. Proofs of his death were filed, and claim made by his widow, also a citizen of Tennessee. Thereupon, in May, 1896, the company sent an agent named Chaffee into Tennessee "to investigate his claim, and the conditions under which the death occurred." He was also authorized to, and did, make a proposition of compromise while here (15 Pickle, 324, 332).

Under §§ 4543-4546 of the (Shannon) Code it was held that the company had transactions in Tennessee with regard to the policies, before and at the time of their delivery, and was doing business with reference to them, through Chaffee, in Tennessee, when process was served on him, and therefore the process and service were suffi-

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cient to bring the company before the Court. 15
Pick., 332.

It will be observed:

(a) That the company had done business and had this transaction in Tennessee;

(b) That Chaffee, as agent, had come into Tennessee in a representative capacity, as agent;

(c) That he had come with respect to the original Tennessee transaction; and,

(d) That undeniably an agent of the company was in Tennessee, and in a representative capacity, and consequently the sole question was whether, under such circumstances, process could be served on the agent so as to bind the company. It was held under the peculiar statute that it could.

The case was carried to the Supreme Court of the United States, and is reported in 172 U. S., 602. The judgment of the Supreme Court of Tennessee was affirmed. The Federal question in the case was whether the Court below had jurisdiction to render a judgment on the service of process on Chaffee. If it had not, the company had been denied "due process of law." 172 U. S., 609. The Court held that by continuing the old policies in force, and collecting the premiums in another State, and sending a regular general agent into the State to investigate and with authority to settle, the company was "doing

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business" within the State as far as is necessary "within the meaning of the statute." Shannon, §§ 4543-6.

The provisions of the statute (Shan.), §§ 4543, 4546, are special and somewhat peculiar. By the first section it is provided that "any corporation claiming existence under the law of another State found doing business in this State, shall be subject to suit here to the same extent that corporations of this State are by the laws thereof liable to the same, so far as relates to any transaction had, in whole or in part, within this State, or any cause of action arising here, but not otherwise."

Section 2 of the Act defines what is meant by the terms "found doing business" in this State in these words:

"Any corporation having any transactions concerning any property situated in the State through any agency whatever acting for it within this State, shall be held to be doing business within the meaning of section 1."

Section 3 provides that "process may be served upon any agent of said corporation found within the county when the suit is brought, no matter what character of agent such person may be, and in the absence of such agent it shall be sufficient to serve the process upon any person if found within the county when the suit is brought, who

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represented the corporation at the time the transaction out of which the suit arose took place.

This Court, speaking of the applicability of the Act to the facts of that case, said: "Not only had the complainant transactions in this State with regard to the policies before and at the time of their delivery, but through its agents was found doing business in respect to them at the time of the institution of this suit, and it cannot be otherwise than that this agent would be reasonably certain to inform his principal of the fact."

It was further said, in regard to the facts of that case:

"Certainly the corporation cannot be heard to complain, whatever others might do, because the agent upon whom service was made in this case was at the time within the State as the representative of the complainant, examining for it into the conditions under which Spratly's death occurred, and, finally, upon the authority of his employer, submitting a proposition of compromise of the claim now in controversy." In that case it is evident this Court gave weight to the fact that an agent of the company was within the State negotiating with regard to the settlement of the policy and this, under the provisions of that Act, was "doing business" in such sense as to justify and warrant service of process.

It is true this Court said: "From July, 1894,

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down to the time the suit in the Circuit Court was brought, complainant company was doing a limited business in Tennessee. It had a large number of policies in the State, from which it collected its premiums at stated intervals," and the Supreme Court of the United States said: "Its outstanding policies were not affected by its withdrawal from the State, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent." *Spratly v. Conn. Mutual Life Ins. Co.*, 172 U. S., 611.

Whether these premiums were paid in Tennessee or beyond its borders does not appear by express statement, but it may fairly be inferred from the statement in the opinions that it was treated as if the payments had been made in the foreign State. It is evident, however, that both Courts laid great stress upon the fact that the corporation had an agent in Tennessee adjusting the claim and with authority to settle the same, and this, under the provisions of the Act, was sufficient to authorize service upon him and for holding that the corporation was "doing business" in the State.

However this may be, the question now before the Court is upon a different state of facts and under a different statute.

The inquiry is not whether a regular agent,

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doing something in the State for the company in connection with the receipt of premiums, causes it to be "doing business" in the State so as to be sued under the service of process Act of 1887, but whether the mere receipt in another State of renewal premiums from persons residing in Tennessee, who remit by mail or otherwise --that and nothing more—is "doing business" in Tennessee within the meaning of the laws regulating and taxing the business of life insurance in Tennessee.

It was said in *Eastern B. & L. Assn. v. Bedford*, 88 Fed. Rep., 4, 17, in regard to this service of process provision of our Code, that it is a special statutory definition for a particular purpose, and cannot be perverted to the purposes of an interpretation of another Act, where only a similar phraseology is used for an entirely different purpose. This was said by the Circuit Court of the United States for the Western District of Tennessee, in a case wherein a transaction with a citizen of Tennessee in the State of New York, involving lands in Tennessee mortgaged to the foreign corporation, was held not to be "doing business" in Tennessee.

In *Norton v. Union Bank and Trust Co.* (8 Am. & Eng. Corp. Cases, N. S., 610) it was held by the Court of Chancery Appeals and the Supreme Court of Tennessee, that a foreign corporation which had no agent or place of busi-

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ness in Tennessee, and had loaned money in another State, on application sent to it through the mail by citizens of Tennessee, and had taken a mortgage, at its home office, on lands in Tennessee to secure the loan, did not "transact business" within the meaning of the Act requiring foreign companies to register their charters.

We think the Spratly case is not conclusive of the real point at issue in the present controversy.

The term or phrase "doing business" does not have, and cannot have, a uniform and unvarying meaning, but is governed largely by the connection, and in view of the object of the statute, and these statutes are governed largely by the objects intended to be effected by them.

We may admit that the receipt of premiums is doing business, but when such receipt is made in a foreign State it does not amount to doing business in Tennessee, but in such foreign State. When the premium is paid and the renewal made and completed in a foreign State, we are unable to see how any business is done in Tennessee. Neither the policy is renewed or continued, nor is the money paid in Tennessee, but both are in the foreign State. There is nothing done in Tennessee, no new business done or solicited, no agent there and no agency, no contract made, no money paid, no receipt for renewal given, and no business done of any character. The postal and express authorities are not the agents

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of the company, but of the insured, as the company's policy stipulates that the premiums shall be paid at the home or foreign office.

It is said that this view will operate harshly upon domestic companies and such foreign companies as continue to issue policies and do an active business in the State. In other words, that a company may come into the State and write a large number of risks, then withdraw and collect its premiums in another State, and thus escape taxation while it receives the protection of the laws of the State. It is true such condition of affairs might arise, but we cannot decide the question before us upon any consideration of expediency or public policy, but upon a proper construction and application of the law as we find it.

We are of opinion this company, under the facts, is not liable for the tax, and the decree of the Chancellor is affirmed and the bill of the State is dismissed, at its costs.

BRIEF OF G. W. PICKLE, ATTORNEY-GENERAL, ON PETITION TO REHEAR.

Statement of Case.—The effect of the Court's decision upon the Insurance Department may be aptly illustrated by supposing that the Attorney-general has been called upon to answer the following letter from the Insurance Commis-

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sioner, presenting some of the questions that must naturally arise:

INSURANCE BUREAU,

NASHVILLE, TENN., January 21, 1901.

HON. G. W. PICKLE,

NASHVILLE, TENN.:

Dear Sir—The Insurance Department needs and desires your opinion and advice upon the following questions:

Several of the foreign insurance companies, both fire and life, that have heretofore been doing business in the State, and paying the tax of 2½ per cent. of their "gross premium receipts" without question, claim that they are not liable for this tax under the recent decision of the Supreme Court, in the Connecticut Mutual Company's case. Their contention is that they are not doing business in the State, because, under their methods, they do not collect or receive premiums in the State, but outside the State, at their home office or other agencies.

1. The New York Life maintains a large corps of agents in the State, who solicit and forward applications for insurance, receive and deliver policies to citizens, and adjust losses; but these agents do not receive or collect either initial or renewal premiums. When notes are taken for premiums, they are made payable at the home office, and sent direct to the home office by the makers. All premiums are paid direct to the

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home office through mail or express agencies. The agents are paid salaries. This company insists that it receives no premiums *in the State*, and is not, therefore, liable for tax. Is it liable for tax?

2. The Mutual Benefit Life does business by a like method, except that the premiums on its policies, both initial and renewal, are made payable just ten days before the date prescribed for the return of the semiannual reports of these companies to this department.

These premiums are made payable outside the State, either at the home office or other agency. This company takes the precaution to withdraw all its agents from the State, and ceases to solicit and take new business during the periods that its premiums fall due and are paid, which likewise cover the date at which semiannual reports are required to be made. Although this company prosecutes actively and vigorously, through resident agents, a large business in the way of soliciting and taking policies and adjusting losses for eleven months of the year, it insists that it cannot be held for the $2\frac{1}{2}$ per cent. tax on "gross premium receipts," especially on renewal premiums, because it collects no premiums *in the State*, and had *withdrawn from the State at time premiums on its old business were paid*.

This company's claim seems to have the sup-

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port of the opinion in the Connecticut Mutual case. Is it liable for taxes?

3. The Globe Life Insurance Company, that has for many years been doing a large business in the State, was during last year excluded from the State, its license revoked, and renewal license refused, because its financial condition was not satisfactory, and it had been guilty of gross frauds. The company, at the time of its exclusion, had 10,000 policy holders in the State, obtained while operating here. It claims the right to continue this business with the citizens of the State, notwithstanding its exclusion for insolvency and fraud, and to do so without even paying the tax on premiums collected. The premiums are payable and are collected at the home office.

Its business is conducted by correspondence, and premiums paid through the agency of the mails and express.

If this company is correct, it is benefited, as regards its old business, to the extent of this tax by its exclusion for fraud and insolvency. Can this company continue this business at all, and if so, without payment of tax?

4. The Connecticut Mutual Life Insurance Company, emboldened by its success, has established agencies at Louisville, Ky., Asheville, N. C., Dalton, Ga., Grand Junction, Miss., and perhaps at other points on the borders of Tennessee, to op-

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erate in Tennessee through the mails and express companies.

It does not propose to put any private local agency in the State, but to operate through these public agencies.

It already has several hundred policies, taken while operating in the State through resident agencies. It claims exemption from regulation and taxation, not only on its old business, but on its new, which promises to be considerable.

As other companies threaten to adopt like tactics, in order to be at no disadvantage, I wish to know if this company is liable for any taxes at all.

5. Some foreign companies, that have conducted their business without collecting premiums *in the State*, claim a return of taxes paid before the recent decision. Are they entitled to return of taxes collected under the statutes declared void or ineffectual by the recent decision?

Is the Commissioner liable personally to these companies for taxes collected under the invalidated acts?

The importance of these questions will appear when it is known that there was realized from the tax of $2\frac{1}{2}$ per cent. of "gross premium receipts" of foreign insurance companies alone \$141,938.20 for 1899, and \$143,263.36 for 1900, as shown by the Treasurer's report.

Not one of the above named companies, except

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the Globe, pays less than \$3,000 taxes per annum to the State, and some of them as much as \$11,000 per annum. If their present contention is sustained, it can be readily seen that this department will be practically wrecked. The State will lose the large and increasing revenue derived from this source.

The department has always been conducted upon the theory (and, since 1895, upon the authority of your legal opinion) that insurance companies that actually do business in the State by soliciting applications, issuing policies, adjusting losses, etc., and actually receive the profits of the business, are liable for this tax, whether they do this business through private, local agencies, or through such public agencies as the mail and express companies, and that they are liable when they actually do all parts of the business, except receipt of the premiums through local agents in the State, although the premiums are sent by mail or express. In fact, it has been considered that payment by deliveray to public agencies in the State, is as much a payment *in the State* as a payment through private agencies in the State. It has been deemed that the tax is exacted, not for the collection of premiums merely, though fixed on the basis of premium receipts, but for the privilege of doing each and every part of the business—soliciting applications, issuing policies, adjusting losses, as well as collecting premiums.

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In view of the Court's decision, it will be necessary to readjust the affairs of this department along different lines from those prescribed by your opinion of 1895, and I shall be glad to have your suggestions at an early date. The decision seems to deny the State the power to deal adequately with foreign companies in the matter of taxation, and it may be the wisest course, in justice to domestic companies, that can be and are taxed, to abandon the effort to raise revenue from this quarter. Very truly,

REAU E. FOLK,
Insurance Commissioner.

The above letter will sufficiently suggest and indicate the confusion and difficulties that will attend the administration of insurance matters under the principles declared in the recent opinion of the Court. But for this decision it would be a complete answer to all these questions and difficulties, to point to the long settled and uniform practice of the Insurance Department, which has never, in any case, been departed from, and never, except in this particular instance, challenged by any foreign company.

II. *Brief and Argument.*—The conclusion that defendant is not liable for the tax sued for must rest upon one of two propositions: either

(1) That there is no statute imposing the tax upon this company, or

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(2) That the statutes, if there are any, are unconstitutional, or for other reasons ineffectual.

To sustain the latter proposition would leave the State without power to impose this tax at all—a very serious situation.

I am firmly convinced that the construction of the statutes and of the powers of the Legislature is too narrow, and will practically wreck the Insurance Department, which shall hold that this tax of $2\frac{1}{2}$ per cent. on “gross premium receipts” laid upon foreign insurance *companies* does not attach unless the premiums are collected or received by local agents of the company within the borders of the State, even though the policies on which such premiums are paid were originally solicited, issued, and delivered through local agents operating in the State, and the premiums upon which the tax is reckoned were paid through the agencies of the mails and express companies.

This construction admits foreign insurance companies to solicit, issue, and deliver policies and to adjust losses through local agents or agencies in the State without payment of any taxes, if they shall arrange to have the premiums sent by mail or express direct to the home office or other agency outside of the State—an evasion of the law so obvious and easy as to make it optional with the foreign companies whether they will observe it. No such construction of a statute is admissible if any other is reasonable or possible.

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It is to make the statute say to foreign companies: "Pay this tax if you want to, but if it is objectionable to you, simply have premiums sent to the home office and continue business in Tennessee, in competition with other taxpaying companies, without paying any taxes."

The language, as well as the manifest policy of the statutes, forbids such construction.

The Insurance Acts impose the payment of this tax as a *condition* to the admission of foreign companies into the State to engage in business, and forbid them to do business without its payment, and authorize revocation of their license for failure for sixty days to pay same.

The Revenue Acts declare certain privileges, and tax same. Among these are "insurance companies," the tax upon which is measured by a per cent. of "gross premium receipts." This is not a tax laid specifically upon the collection of premiums. That makes a sieve of the statute, and leaves it no vitality or force. It is a tax, in terms, upon insurance *companies*. That is the name given to the privilege.

This means, obviously, the vocation or business of insurance—the doing of insurance. It does not mean to tax a mere name or existence. The business of "insurance companies" consists, not merely in collecting premiums, but largely and chiefly in soliciting, issuing, and delivering policies, and in adjusting losses. It is upon this entire business,

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and upon every part of it, that the tax is laid. The defendant consented to pay this tax as one of the conditions of its admission.

It is not essential that it shall do *every part* of insurance business to render it liable for tax. It is enough if it does *any part* of it.

It is liable if it solicits alone, or if it delivers policies alone or if it collects premiums alone, in the State. Any other construction would make nonsense of our entire system of privilege taxation. What privilege is exercised to its full extent, or in all its parts? If to omit to exercise the whole business avoids the tax, what privilege tax cannot be evaded?

The revenue statutes specially provide that privilege taxes shall attach, if any thing is done in the particular line of business, "whether they make a business of it or not." To hold that this tax attaches alone to the collection of premiums, leaving all other insurance business free, is like taxing a merchant on the value of his yardstick, and leaving the value of his goods free.

That the practices suggested by the above letter have not hitherto prevailed is attributable to the fact that they have been supposed to be illegal, forbidden, and unavailing, and have been repressed by the insurance department with a strong hand.

That defendant, in the face of these discouragements, has been able to maintain a profitable

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business in the State for six years without effort, suggests what can be done, when, released from legal restraints, it shall pursue its business actively through the mails. It has lost only about five per cent. of its policy holders per annum during the six years. It has maintained an average of \$27,000 premium receipts.

1. *There are, without question, statutes which, if valid and applicable, render this company liable for the tax sued for. These statutes are so plain that they do not admit of construction or doubt.*

The agreed facts are that this company, after having done business in the State for a quarter of a century in the usual way, ceased in 1894 to solicit new business and withdrew its local agents.

It had, at this date, several hundred policies which its local agents had solicited and procured while operating in the State.

It continued to collect premiums and adjust losses upon these policies, but did it in the State by the use of public agencies, such as the mails and express companies, instead, as formerly, by its own private and local agencies. It collected an average of over \$27,000 per annum on these policies, and it is for the tax measured by these "gross premium receipts" that the State seeks to recover.

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The Revenue Acts of 1897 and 1899, in connection with the imposition upon *foreign insurance companies* of a privilege tax of "2½ per cent. of gross premium receipts, payable semiannually, January and July," provide that "*life corporations of other States and foreign countries, ceasing to transact new business in this State, shall continue to pay the taxes herein provided on business in force, and until the same be terminated.*" Acts 1897, Ch. 2; Acts 1899, Ch. 432.

These provisions embrace and tax the premiums collected by this company after its so-called withdrawal, if it be possible to do so.

Thus, it appears unquestionably that the Revenue Acts of 1897 and 1899 provide for the taxation of this company after its so-called withdrawal.

It is settled in this State, and by an overwhelming preponderance of judicial opinion elsewhere that life policies are not contracts from year to year, but entire and continuing contracts that terminate only with the death of the assured, or his failure to pay stipulated premiums. *Ins. Co. v. Heidel*, 8 Lea, 498; *Ins. Co. v. Stathan*, 93 U. S., 30; 2 Joyce on Ins., Sec. 1102; 49-Me., 200; 59 Ill., 123; 19 N. Y. Supp., 481; 78 N. Y., 114.

Nor can this company evade the force of this statute by the insistence that it had withdrawn from the State before its passage. It had not;

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withdrawn as to these policies, but was receiving from them precisely the same premiums by public agencies as it would have received by its private agencies. If this business had not been previously taxed (which is not admitted), it was competent for the Legislature to tax it. The Legislature has absolute, uncontrolled discretion over foreign corporations. They have no vested rights to have the tax laws remain unchanged. Even domestic corporations and citizens have no such right. As well might a nonresident, citizen, or corporation, purchasing land in the State, contend that the rate of taxation can never be raised over that existing at date of the purchase. It was, as we shall elsewhere see, a condition of this company's admission that it would pay taxes imposed on its business. The Court will not seriously entertain the proposition that a foreign insurance company, that has been the guest of the State for a time, may leave, taking part of the valuables of its host, and that the State has no power to prevent such result.

But other provisions of the Revenue and Insurance Acts taxed this company upon the basis of its "gross premium receipts," after its so-called withdrawal, without the aid of said direct and specific provisions of the Revenue Acts of 1897 and 1899 on the subject.

The "Insurance Act of 1895" declares it "unlawful for any company to make any contract of

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insurance upon or concerning *any property or interests or lives in this State or with any resident thereof,*" except upon the terms prescribed in that Act. Acts 1895, Ch. 160, Sec. 2.

Among the terms and conditions prescribed for the doing of business by foreign corporations, is: Semiannual reports—July and January—of premium receipts, and payment of a tax of $2\frac{1}{2}$ per cent. thereof, under penalty of forfeiture of license if same is not paid within sixty days. (Sec. 19.)

The Revenue Acts levy a privilege tax upon foreign insurance companies, of " $2\frac{1}{2}$ per cent. of gross premium receipts, payable semiannually, January and July." Acts 1893, Ch. 89.

It will be observed this tax is laid upon the companies, not upon the premiums, though measured by the latter. Acts 1897, Ch. 2.

And that Act further provides "that any and all parties, firms, or corporations exercising any of the foregoing *privileges* must pay the taxes as set forth in this Act for the exercise of said privileges, whether they make a business of it or not; and this Act shall not be so construed as to exempt any person, firm, or corporation whatever exercising any of the foregoing privileges from payment of the taxes herein prescribed for the exercise of said privileges." Acts 1897, Ch. 2, Sec. 14.

The same provision will be found in the other

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revenue Acts. Among the privileges enumerated and taxed by these Acts is "insurance companies"—the privilege of doing insurance business. This tax is measured by premium receipts.

These provisions do not admit of the construction that the Legislature intended to exempt foreign insurance companies from this tax, measured by the gross premium receipts, in any case where it had power to impose it.

It imputes extreme folly to the Legislature to suppose that it intended to exempt foreign insurance companies from a tax that it laid upon domestic companies.

The statutes have therefore laid the tax sued for, and the State is entitled to recover unless these statutes are, for some reason, invalid or ineffectual.

Revenue statutes are not penal in their character, and are not strictly but fairly construed.

2. The statutes, above cited, which make the defendant company liable for the privilege tax of 2½ per cent. of its "gross premium receipts" collected on its old business after it had ceased to take new business and had withdrawn its agents from the State, are not unconstitutional, or for any other reason invalid.

These statutes are not obnoxious to the State Constitution.

It provides that "the Legislature shall have power to tax merchants, peddlers, and privileges

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in such manner as they may from time to time direct." (Art. II., Sec. 28.)

This clause has been construed to give unlimited discretion to the Legislature in the creation and taxation of privileges. 86 Tenn., 136; 3 Head, 414; 8 Heis., 456, 544; 92 Tenn., 369.

These statutes are not in conflict with the Federal Constitution.

The assumption and payment of this tax is one of the terms and conditions upon which foreign insurance companies are permitted to enter the State and to continue business therein. Acts 1895, Ch. 160, Sec. 19.

And it is a valid condition, even if foreign insurance companies are required to pay a greater tax than domestic companies engaged in the same business.

Foreign corporations are not citizens within the clause of the Federal Constitution providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Paul v. Va.*, 8 Wall., 168; *Bank v. Earle*, 13 Pet., 538; *Ducat v. Chicago*, 10 Wall., 410; *Mining Co. v. Penn.*, 125 U. S., 181; 1 Joyce on Ins., § 328; 1 Thomp. on Corp., § 12; 6 Thomp. on Corp., § 7928; 13 Am. & Eng. Enc. L., 845.

The business of a foreign insurance company is not interstate commerce. *Paul v. Va.*, 8 Wall.,

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168; *Hooper v. Cal.*, 155 U. S., 648; 1 Joyce on Ins., § 328.

Foreign corporations are "persons" within that clause of the XIV. Amendment which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws," but this clause does not affect the power of the State to exclude foreign corporations from the State, or to prescribe any conditions it may choose for their admission. 13 Am. & Eng. Enc. L., 846; 119 U. S., 110; 118 U. S., 394; 125 U. S., 181.

The reason is that foreign corporations are not "within its jurisdiction" until they have performed the conditions upon which they are entitled to admission into the State.

"Any other construction of this clause would entitle foreign corporations to the same privileges as domestic corporations, and, as has been seen, it is within the power of the State to exclude foreign corporations entirely." 13 Am. & Eng. Enc. L., p. 846; 119 U. S., 110.

"There is nothing in the Federal Constitution that prevents a State from prescribing the terms on which foreign corporations shall come within its borders and carry on business with its citizens. The whole matter of admitting foreign corporations to do business in a State rests absolutely in the discretion of the Legislature of the State. The terms it imposes may be reasonable or

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unreasonable. The comity ordinarily extended is accompanied by no legal sanction. It is never extended when the existence of the corporation, or the exercise of its powers, is prejudicial to the interests of the State, or repugnant to its policy; and although it has been extended, it may at any time be recalled." 13 Am. & Eng. Enc. L., 860, 861; *Dugger v. Ins. Co.*, 95 Tenn., 245; *State v. Phoenix Ins. Co.*, 92 Tenn., 431; 119 U. S., 110; 136 Mo., 391.

The constitutional provisions are designed to protect *rights*; they take no cognizance of matters of mere *comity*.

The statutes in direct terms impose the tax sued for, and these statutes are valid.

The conclusion is inevitable that the State is entitled to recover.

If there could be any doubt, even a serious one, as to the validity of these statutes under the Federal Constitution, the State Court should sustain the statutes, in order that the matter could reach the Federal Supreme Court. The State has no appeal, while the other party has appeal.

Devices to evade State taxation do not meet with favor, or even toleration, in the United States Supreme Court. *Mitchell v. County*, 91 U. S., 206; *Bristol v. County*, 177 U. S., 143; see, also, 174 U. S., 70.

3. In answer to some of the arguments made in

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support of defendant's contention, we submit the following propositions:

(1) *That the defendant's policies, upon which premiums were collected after its so-called withdrawal in 1894, are the identical policies taken by its local agents operating and doing business in the State prior to that time. Life policies are entire and continuing contracts, not mere contracts from year to year. To continue a business, established while defendant was in the State, even to wind it up, is to do business in the State.*

In the case of *Ins. Co. v. Stathan*, 93 U. S., 30, Mr. Justice Bradley, passing upon this very question, says:

"That the contract (an ordinary life policy with forfeiture clause for nonpayment of premiums) is not an *assurance for a single year*, with a privilege of renewal from year to year by paying the annual premiums, but that it is an *entire contract of assurance for life*, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums. Such is the form of the contract, and such is its character. . . . *Each installment* is, in fact, part consideration of the *entire insurance for life*. It is the same thing when the annual premiums are spread over the whole life. The value of assurance for one year of a man's life, when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit.

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"There is no proper relation between the annual premiums and the risk of assurance for the year in which it is paid.

"This idea of insurance from year to year is the suggestion of ingenious counsel.

"The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies.

"The whole premiums are balanced against the whole insurance."

In *Insurance Co. v. Heidel*, 8 Lea, 498, Judge Cooper, passing upon this question, cited the above case with approval, and said:

"The contract is not an assurance for a single year, with the privilege of renewal from year to year by paying the annual premiums, but it is an entire contract of assurance for life, subject to discontinuance or forfeiture for nonpayment of any of the stipulated premiums."

The same doctrine is held in 49 Me., 200; 59 Ill., 123; 19 N. Y. Supp., 481; 78 N. Y., 114. And has the approval of Mr. Joyce. 2 Joyce on Ins., Sec. 1102. It likewise has the sanction of sound reason.

The policy on its face purports to be a continuing contract.

The parties contemplate its continuance, certainly; for the real benefit of the contract does not

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accrue to the beneficiary until after the assured's death.

The company's liability does not accrue until after the assured's death.

If the premiums are paid no new or renewal policy issues. The *old* one remains outstanding. The premiums are paid on the old contract and according to its terms. A new policy would not issue for the same premium, as the assured is a little older.

The State, in fixing as a condition for defendant's admission, a tax measured by a per cent. of its premium collections, instead of a gross annual sum, or round charge for each application, or each policy, or each adjustment, must have had in view this peculiar feature of the insurance contract, which had been declared by decision of this Court, by which the company would be required to pay tax during the life of each policy. Otherwise a severer tax would probably have been imposed: Say upon applications, issuance of policies, or adjustment of losses, or upon all. But, instead, the equitable tax which ran with the life of the policy was imposed for the privilege of conducting the insurance business.

These contracts were made in Tennessee, under an agreement on the part of the defendant company, by which it obtained admission into the State, that it would pay the tax measured by

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the premium receipts from the policies so long as they continued in existence.

If these premiums were not paid on the old policies, then defendant was engaged in taking new business in the State through public, instead of private, agencies.

(2) *Premiums collected, through the agency of the mails or express companies, on policies taken by the defendant before its so-called withdrawal from the State, are to be treated as received within the State. The mails and express companies became the insurer's agents.*

Inasmuch as the tax is levied for the privilege of doing the entire business of insurance, and attaches if any part of that business is done, it is, perhaps, not material whether the premiums were received in the State, if the applications were taken and the policies issued in the State on which the premiums accrued. Though measured by a per cent. of premiums received, the tax is not one on premiums, but on the companies for the privilege of engaging in the insurance business or some part of it. Companies are liable if they do anything, "whether they make a business of it or not."

If this were not true, small revenue could be realized from privileges, as few persons exercise any privilege to the fullest extent possible or in all its parts.

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But not only were the defendant's policies solicited and issued in the State, but it also collected the premiums thereon within the State.*

The premiums were sent by letter or express.

The law applicable in such case is thus stated by Mr. Joyce:

"If the premium is authorized to be paid through the mail, *it is paid by depositing a prepaid letter, properly addressed, in the postoffice containing the remittance*, and the party has done all that can be required in order that it should reach the other party in due course of time. . . . And it is held that depositing a letter, properly addressed, in the post office, postage prepaid, operates as a payment *at that time*, when payment of premiums by mail is authorized by the insurer." (2 Joyce on Ins., Sec. 1163.)

*The proposition that delivery to a common carrier is delivery to the consignee was twice decided by oral opinions at the December term, 1900, of the Supreme Court at Nashville.

In the case of *Harris & Filson v. State* the appellants had been convicted of selling liquor without license in Trousdale County. The facts were these: Harris & Filson were duly licensed as retail liquor dealers in Sumner County, and had a saloon in that county. Curtis West, living and being at the time in Trousdale County, ordered from them by telephone one and one-half gallons of liquor. They filled the order, delivering the jug of liquor to an express company in Sumner County, directed to West in Trousdale County. It was sent c. o. d.

The Court held, upon these facts, that the delivery of the goods to the carrier, c. o. d., in Sumner County, addressed to West in Trousdale County, was a delivery to West in Sumner County, and that the sale was made and completed in Sumner County, and that the appellants, having license in Sumner County, were guilty of no offense. The authorities upon which this decision was made are: 43 Ark., 353; 71 Ala., 568; 73 Maine, 278; 96 Penn., 449; 22 W. Va., 743 (S. C., 22 L. R. A., 430); 97 Mass., 89.

The other case was that of *Duncan v. State*. Duncan was convicted of selling liquor without license in Hickman County. The facts were that Duncan, as traveling salesman of B. W. Hooper & Co., who were duly licensed wholesale liquor dealers at Nashville, took an order to his principals, but subject to their approval or rejection in Hickman County, for one gallon of liquor. He forwarded the order to the firm at Nashville, who accepted it, and the liquor was shipped to the purchaser. Neither Duncan nor his principals had license to sell liquor in Hickman County. The Court held that the sale was made and completed in Davidson County; that it was a sale by Hooper & Co., and not by Duncan, and that delivery to the carrier was delivery to the purchaser in Davidson County. The case was reversed.

The first of above cases was decided by the Chief Justice and the other by Judge Beard.—REPORTER.

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And delivery of premiums to an express company operates as payment from date of such delivery, although the same may be stolen by an agent of the express company. *Id.*, Sec. 1165.

Delivery of a bill or note to the postman is sufficient. 1 Daniel, Neg. Inst., Sec. 67; *Kirkman v. Bank*, 2 Cold., 403-406.

It is familiar law that a common carrier is agent of the consignee, and that, ordinarily, delivery to it is delivery to the consignee.

So, delivery of letter into post office is delivery to the addressee, and entitles him to it at once as against the sender.

Even the premiums are collected in Tennessee.

If this is not true, then the receipts for premiums are delivered in Tennessee, being sent by mail.

(3) *By coming into the State and taking policies, and continuing to collect premiums thereon, the defendant agreed and assumed to comply with all terms and conditions imposed by statute upon foreign insurance companies, including compliance with tax laws.*

The State had absolute discretion in the matter of admitting or excluding the defendant, and in prescribing terms for its admission.

We have already noted the conditions imposed as regards taxation.

The defendant engaged to comply with these terms and conditions by accepting the State's comity.

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The defendant had no business in the State before its admission. It had no right to any.

What it acquired and did while operating in the State was by the State's comity. Its permission was limited to do business while in the State, not after. It was no part of the State's consent or the defendant's license to take from the State, on leaving, anything more, in the way of business opportunities, than it brought with it.

Is it a fair construction of the transaction by which defendant, as a matter of comity, was permitted to enter the State and engage in business with our citizens, to hold that it may at will, after securing large business advantages, throw off all its obligations to the State, refuse to pay taxes, withdraw from supervision of the Insurance Commissioner, and at the same time take the profits of such business?

To permit defendant to compete in this way with domestic companies, without payment of taxes, would bring it within the category of companies to which comity is never extended. It is said that comity is "never extended when the existence of the corporation or the exercise of its powers is prejudicial to the interests of the State or repugnant to its policy."

Would not such a contract be a severe arraignment of the Legislature for folly, as it had full powers to prevent such result?

Under defendant's contention this company can

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take all the policies it can get for a six months and then go over the border and collect the premiums, and thereby evade taxes on the business it does in competition with taxpaying companies. It can repeat this experiment as often as it chooses.

Its act, in such case, would be legal though savoring of the moral quality that attaches to that of a guest who takes, on leaving, the valuables of his host.

This is not a reasonable construction of the statutes under which the State extends its comity to foreign corporations, and one which they cannot, with any degree of fairness, insist upon.

(4) It is sufficient, to give the State jurisdiction to tax and regulate defendant's business, if any part of it, however slight, transpires within the State. It is not essential that defendant should be in the State by private or local agents.

The statutes, as we have seen, are broad enough in their provisions to reach this company after its so-called withdrawal.

The power of the State to pass these statutes is the matter now under consideration.

The State has jurisdiction even in criminal matters, in such cases.

“Where a man, standing beyond the outer line of our territory, by discharging a ball over the line kills another within it; or, himself being abroad, circulates libels here; or in like manner

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obtains here goods by false pretenses; or does any other crime in our locality against our laws, he is punishable, though absent, the same as if he were present." 1 Bish. Cr. L. (New), Sec. 110.

"If a material part of any crime is committed on our soil, though it is the lighter part, legislation, with us, may properly provide for the punishment of the whole of it here—at least where no jurisdiction abroad has, in fact, been taken." (*Id.*, Sec. 116.)

"If the offer (to bribe) is made by letter through the post office, the writer commits a complete offense at the place where he deposits the letter, as well as at the place where it is received." (*Id.* (1), Sec. 88.)

Our criminal statutes and decisions recognize the same principle. Code (M. & V.), § 5802; *Williams v. State*, 92 Tenn., 275.

It is not essential that a party be in the State in order to do business in the State.

"Although the contract is made and dated in one State, but is to be binding only on delivery, the laws of the State where the insured is a resident, and where it is delivered to him, govern the contract.

"And, as a general rule, the delivery of the policy to the insured in the State in which he resides, and the payment by him of the first premium in that State, renders the contract sub-

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ject to the laws of such State." 1 Joyce, Sec. 230, citing 58 Fed. Rep., 541; 7 C. C. App., 359; 160 Mass., 414.

Foreign corporations cannot withdraw themselves from a State into which they have entered, by a provision in their policies. 1 Biddle on Ins., Sec. 84; 13 Fed. Rep., 526.

So of other corporations seeking to withdraw from the jurisdiction to tax them. 177 U. S., 143; 174 U. S., 70; 91 U. S., 206.

This company has been held, upon the facts of this record, to have been doing business within the State from 1870 to 1894. *Ins. Co. v. Spratley*, 172 U. S., 611; *Ins. Co. v. Spratley*, 99 Tenn., 334.

True that was a different statute, but its provisions are not so strict as those of the statutes now under consideration.

Insurance companies are held to be doing business in the State, without having local agents therein, in these cases: 7 Mo., 388; 65 Ill. App., 355; 73 Miss., 321, 330; 89 Wis., 545 (S. C., 46 Am. St. Rep., 855).

The authority of the *Allgyer* and *Norton* cases cited by defendant is not controverted.

The former involved the right of a *citizen* to take insurance in another State in a foreign company. Foreign corporations are not citizens, nor entitled to the rights of citizens.

The *Norton* case was under the noncompliance

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Act, which is construed with great strictness to prevent hardship. These cases are clearly distinguishable from the one at bar.

"The distinction," says Mr. Thompson, "is between the case where the company procures a risk within the foreign State by *its own affirmative action* or where it allows a broker to procure a risk for it for his own pecuniary gain, and the case where a resident of a foreign State, of his own volition, solicits the writing of a policy upon his own life or property." 6 Thompson on Corporations, Sec. 7937.

The defendant solicited its policies in the State originally.

It obtained and holds them by its own affirmative action. That is the test, even where the company has never been in the State by its agents.

The defendant put into its policies such forfeiture clauses as compelled their continuance or severe loss to the policy holder.

This defendant took its policies in Tennessee by local agents originally, but even if this were not true they were renewed under stress applied—the affirmative action of the defendant.

(5) *The supposed injustice resulting to foreign insurance companies from want, or supposed want, of power to withdraw from the State is imaginary.*

The terms or conditions upon which foreign

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corporations are permitted to enter the State may be reasonable or unreasonable at the discretion of the Legislature, which has the power of absolute exclusion. The corporation accepts these terms and conditions voluntarily if at all.

It would have no right to complain if one of these prescribed conditions which it accepted denied it the right of withdrawal. It could not complain of injustice or hardship.

But the law does not deny good faith withdrawal.

Undoubtedly a foreign company may stipulate with its policy holders for the contingency of its withdrawal if it chooses.

It may reinsure all its risks and go out.

What it is forbidden to do is to withdraw from burdens without withdrawing from benefits. It is forbidden to go out to avoid taxes and, at the same time, stay in to reap profits.

It is not permitted to take an unfair and dishonest advantage of the comity that the State has extended to it, and place itself in a position, by reason thereof, to compete, without payment of taxes, with the taxpaying companies of the State.

The guest who has robbed his host, has just as much right to complain that the host objects to the operation.

What are all of our insurance laws for the protection of citizens against insolvent and unreliable companies worth, if these companies may

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defy the State's authority and do business with the citizens?

No company wanting to go out of the State in good faith and in fact, not merely in form, will meet any serious obstacles. This, however, is not a controlling fact in the case.

(6) *The supposition that Tennessee policy holders are to suffer loss, and that foreign insurers are to get great gain from the Court's sustaining the State's contention that such companies are not permitted to maintain an old business in the State without payment of taxes, is a very clever invention of ingenious counsel.*

This objection comes from an insurance company, not from a policy holder. This fact discredits it.

It is assumed that a foreign insurance company that has had its license revoked for its own fault—*e. g.*, fraud or insolvency—and is thereby forced to quit the State, or has voluntarily abandoned its business because of its unwillingness to pay taxes or otherwise comply with the conditions upon which it was admitted into the State, can, in some way, acquire an advantage, on that account, over its Tennessee policy holders.

It is difficult to conceive what it is the insured can lose to the insurer in such case.

The insurance company that from fault or choice refuses to qualify itself to carry out its contracts,

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is in no situation to take advantage of its policy holders.

It is a condition of every policy that the company is qualified to do business, and will remain so. Surely, it is no part of the insured's business to look after the qualification of the insurer. If the insurer makes default, it is liable in damages.

The Court will find some difficulty in defining what it is that the insured loses to the insurer by the demand of the State, made in behalf of fair dealing and the safety of the citizens, that the insurer shall pay legitimate taxes and submit itself to such supervision as the law deems essential to the safety of those insured.

The company, in paying this tax and submitting to supervision, does no more than is required of the safe and solvent companies, foreign and domestic, that do a legitimate business in the State.

Suppose a company having policy holders in the State has become insolvent and unable to qualify under our laws to continue business, can it set up the plea that it will injure these policy holders to enable it to continue business in violation of law? Has a company that wilfully declines to comply with tax and other laws any stronger claim?

(7) *An insurance policy, with forfeiture clause for nonpayment of annual premiums, is not an*

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unilateral contract binding the insurance company but not obligating the insured.

It has already been shown that these policies are not mere contracts from year to year, but entire and continuing contracts. If the contract of the policy is unilateral it is wanting in mutuality, and void.

"The reason of this is that a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement." 1 Par. Cont., pp. 448, 449, and notes.

Defendant would hardly admit that it has been engaged in issuing this sort of policies. It is true each party has not the same kind of remedy for breach of the contract, but each has a remedy.

The insured must obtain his remedy by suit. The insurer has provided a summary remedy for its indemnity for breach, to wit, forfeiture of all premiums that it has received.

The matter is a little one-sided, but the one-sidedness is in favor of the insurer. He perhaps reaps as much benefit, probably more, from breach than from performance of the contract by the assured.

In conclusion, this is a contest for the life of a young, prosperous, revenue yielding department of the State government.

The contest is between the State and foreign

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insurance companies, whom it had the right to exclude entirely or to admit on harsh or impossible terms. If this company succeeds, then all foreign companies can withdraw, and through the mails, by a little effort, keep up that business in the State, which yielded last year over \$143,000 revenue to the State, without paying one dollar taxes. This company has succeeded in keeping up for six years, without effort, a very valuable business. Cannot others do the same? Nearly the entire life insurance of the State is done by foreign companies. G. W. PICKLE,

Attorney-general.

ADDITIONAL BRIEF SUBMITTED BY G. W. PICKLE.

I. There is no escaping the conclusion that the statutes do tax this company, and since 1897 in terms so direct and specific as to admit no dodging the conclusion. Acts 1897, Ch. 2; Acts 1899, Ch. 432.

The tax is imposed whether it be a condition or not. But it is a condition, and so made by both the Acts of 1875 and 1895.

The Acts of 1875, Ch. 66, provides that no foreign insurance company shall "transact any business of life insurance in this State without *first* obtaining a license therefor from the Bureau of Insurance and a certificate of authority for each agent employed." Sec. 1.

And that the Commissioner is required to issue "a

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license to transact the business of life insurance within the limits of the State upon the terms and conditions set forth in this section (§ 3) and those herinafter provided." Sec. 3.

By Sec. 5 the payment of tax is required "on gross premium receipts, payable on the first days of January and July of each year, on sworn statement of the president and secretary of the company." Sec. 5.

And sworn statement of income is made a condition under Sec. 2 of this Act.

The supposition that subsequent Act of 1895 was materially different on this part is a mistake. It was a mere collation of older Acts in the main. That Act, however, makes it absolutely clear that the payment of this tax is a condition, though that is not material.

Under Sec. 19 of that Act a foreign company, failing to pay this tax is "debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in the State." Compare Sec. 2 of the Act.

The defendant company cannot evade the effect of statutes passed subsequent to its so-called withdrawal. If the State could have made payment of this tax a term or condition of admission, or imposed it at that time, then the State could

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make it a term or condition of the company's continuance in the State, or impose it at any time it chooses.

It is imposed and binding on defendant, if it can be made so at all.

Defendant has no vested right in the status of the insurance laws existing at date of its admission. This is clear.

The State's right to recall a company's license and exclude it from the State is just as absolute as its right to admit or exclude originally. Any terms may be imposed for the privilege of remaining in the State. (See former brief.)

But the Act of 1895 provides for this very thing thus: "That nothing contained in this Act shall be so construed as to prevent the repeal or amendment of the same or any section thereof by the present or any future General Assembly of this State."

The defendant entered the State with this provision in the law.

The question comes to this: Can the State tax a company in the situation of this company at all; if it can, it has done so. If it has not done so, then it cannot do it at all.

II. It is clear this company has not withdrawn from the State or complied with the terms upon which it is permitted to do so.

It was required by Act of 1875, and subsequent Acts, to make certain deposits for the benefit of

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policy holders it might obtain in the State. Acts 1875. Ch. 66, Sec. 3; Acts 1877, Ch. 108; Acts 1895, Ch. 160, Sec. 9.

Also, to file power of attorney for acknowledgment of service of process.

In regard to this deposit, Sec. 24, Acts of 1895, Ch. 160, makes this subsequent provision: "And he [the Commissioner] may return to the trustees or other representatives authorized for that purpose, of a foreign insurance company, any deposit made by such company, when it shall appear that such company has ceased to do business in the State and is under no obligation to policy holders or other persons in the State, or in the United States, for whose benefit such deposit was made."

There is no other method prescribed for withdrawal from the State except to wind up its entire business and cancel every liability to citizens of the State, and we insist to the State as well. Defendant came or remained in the State on these terms.

OPINION ON PETITION TO REHEAR.

WILKES, J. A very earnest petition to rehear is filed by the State in this case, and the Court is asked to reconsider and reverse its original holding.

The petition, taken alone, presents nothing new, but a very elaborate brief is presented by the

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Attorney-general, setting out very fully what it is feared will result from the holding, and going very elaborately into an argument of the questions passed on in the original hearing. Among other things it is said that foreign insurance companies will take advantage of this decision and avoid altogether the payment of taxes, and thus deprive the State of a very large and increasing source of revenue.

Of course every company which comes within the proper operation of the decision will be affected by it, but it will only apply to such as bring themselves strictly within its provisions, and it cannot be used as a pretext by companies not in like conditions, to evade the payment of any legitimate tax imposed. It is said by the Attorney-general that the construction placed upon the Act will permit foreign insurance companies to solicit, issue, and deliver policies, and to adjust losses through local agents or agencies in the State without payment of any taxes, provided they arrange to have the premiums sent by mail or express direct to the home office or other agency outside of the State. The opinion of this Court does not admit of such construction, but on the contrary repels it, and holds that if the companies solicit, issue and deliver policies or do any other thing through local agents in this State, whether such agents are the express companies or the postal authorities, or agents exclusively of the

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company, they would not fall within either the letter or spirit of the decision.

We think that under the facts of this case neither the express companies nor the postal authorities can be considered as the agents of the insurance company, but they are, when used, the agents of the insured to transmit the premiums to the company's offices beyond the State. Until the money reaches the home or foreign office of the company and is received by it, it is not the money of the company, nor is the insured entitled to the renewal. If the money is lost *en route*, it is not the loss of the company, but of the insured. Premiums are not authorized, expressly or by implication, to be paid through the mail or express company, but only at the home or foreign office, and the renewal receipts are then delivered. It is true the Acts of 1897, Ch. 2, and of 1899, Ch. 432, provide, in substance, that life corporations of other States and foreign companies ceasing to transact new business in the State, shall continue to pay the taxes herein provided on business in force and until same be terminated.

We have no doubt but that a foreign company which enters the State after the passage of such an Act, or which, being in the State prior to its passage, remains in the State and doing business in it after the Acts take effect, are subject to the provisions of the Acts even if they after-

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wards withdraw, but these acts do not apply in the present case, because the defendant company withdrew from the State in 1894, and was not doing business in the State when the Acts took effect in 1897 and 1899. Nor was it made a condition upon which the company originally entered the State that it should continue to pay, after its withdrawal, upon business then in force.

This decision does not in any way question the right of the Legislature to impose such tax requirements upon foreign corporations as it may see proper, as a condition for their entering the State, nor such as may be legitimate for their continuing to do business in the State, but it only applies to companies which withdraw from the State at a time when there is no Act in force taxing them for receiving premiums beyond the State and which have not expressly nor impliedly consented to such taxes. The insurance Act of 1895, Ch. 160, Sec. 2, has no application to this case, but only applies to the making or entering into contracts of insurance. The crucial question in this case is whether the company, under the facts stated, is "doing business" in the State. Unquestionably the Legislature may have made it a condition precedent to entering the State, that the company shall continue to pay taxes upon its receipts after its withdrawal, and it no doubt can make it a like condition for its future withdrawal, but it had not done so when

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this company withdrew from the State, but the attempt in this case is to impose the tax after the company has withdrawn from the jurisdiction of the State.

The Attorney-general has formulated quite a number of hypothetical cases, none of which are covered by the terms of the present decision and which are not covered by this opinion. The decision is limited, as are all others, to the facts of the case, and is determinative only of the questions strictly at issue in the case. Whether other companies occupy exactly the same status as the present company we are not advised, and we express no opinion as to those who do not occupy the same status. We think there is no error in the opinion originally rendered in the case, and the petition to rehear is dismissed.

Hightower v. Wray.

HIGHTOWER v. WRAY.

(*Nashville.* January 26, 1901.)

1. **MORTGAGES AND DEEDS OF TRUST.** *Description of secured debt.*

Under a mortgage or deed of trust, in which the maker has classified his debts and directed them to be paid in a certain order of priority, a creditor of a preferred class, whose debt is described as being "about \$1,500," cannot, as against creditors classed below him in the order of priority, prove and secure preference for a note on which there is due \$4,000, although it is the only claim that the creditor held against the maker, and was clearly the debt referred to in the instrument.

Case cited: *Coldwell v. Bowman*, 1 Shann. Cas., 601.

2. **SAME.** *Effect of misdescription.*

But, in such case, the creditor takes \$1,500 in the prefatory class, and the remainder in some other less favored class, according to the provisions of the instrument.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County. Hon. H. H. Cook, Ch.

PERCY D. MADDIN for Hightower.

MORTON B. HOWELL and **NOLEN & SLEMMONS**
for Wray.

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WILKES, J. The question involved in this cause is the proper construction of a deed of trust made by W. A. Wray. It contains a provision in substance as follows:

"I owe L. C. Hightower about \$1,500, which I wish paid in full." It turned out that he owed Hightower but one debt, and that was a note, and amounted, principal and interest, to about \$4,000.

The bill is filed in a double aspect, claiming payment of the entire debt of \$4,000, upon:

1. A construction of the terms of the instrument.

2. On the intention of the maker in executing the deed, which is sought to be shown by parol.

Both contentions were found against the complainant, the Court of Chancery Appeals holding that if the instrument alone be looked to, complainant could claim only \$1,500, or about that sum, and if the parol proof be allowed to control, then the facts are that the maker only intended that amount to be paid. This parol evidence was introduced without objection, and the finding of the Court of Chancery Appeals upon it is a matter of fact, and is perhaps conclusive of the entire controversy. We proceed to consider it, however, in the other aspect of the case.

The deed of assignment divides the debts provided for into five classes, from A to E, and they are to be paid in the order mentioned.

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Complainant's debt falls in Class D, the fourth class, and is described as follows:

Class D.—L. C. Hightower, \$1,500.00.

It is directed that the debts be paid as follows:

1. The expenses.
2. Class A in full.
3. Class B in full.
4. Class C in full.
5. To the payment of the amount due L. C. Hightower, described as Class D, until he shall have been paid in full.
6. To the payment of the creditors in Class E and any other just debts owing by me ratably until they shall have been paid in full.

It appears that complainant's debt and the only one owing him by Mr. Wray, was a note originally for \$7,121.34, but having on it a number of credits, which reduced the principal to \$1,500. It had been running for several years, and much interest had accumulated. In the case of *Caldwell & Hayes v. W. C. Bowman et al.*, 1 Shannon's Cases, 601, there was a deed of trust. It provided to pay a note for about \$76, "if he shall produce the note," referring to one E. Donaldson. A note for \$187 was produced and filed as the note intended to be secured, and it was held that the language used would not identify a note for more than double the sum mentioned; that the language used would serve to identify a note for a few

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dollars, more or less, but not one for so great an amount. It is true that in the present case there is more to identify the note than in the case we have cited, and indeed there is no question but that the note sought to be set up in this case is the one intended and referred to in the deed of trust, but the decision is made to rest upon the great discrepancy between the actual amount of the note and the amount as described.

The Court of Chancery Appeals says: "Whether we look to the face of the deed alone or to parol testimony to gather the intention of the maker of the deed of trust, we find that the purpose and intention was only to secure \$1,500." We think this conclusion is correct.

We are referred by the industrious and zealous counsel for complainant to a number of cases in which debts greater or smaller than those specified and described have been allowed.

In *Brown v. Weir*, 5 Serg. & R., 401, a debt was described in the assignment as about \$11,000. It was in fact over \$13,000, and it was held that it should be allowed.

In *Dedham Bank v. Richards*, 2 Metc., 105, the deed of trust described the debt as about \$4,500, and the creditor was allowed to prove claims to the amount of \$5,867.

In *Canady v. Paschal*, 3 Iredell Eq., 181, the debt was described as about \$1,000, and it was held to secure a debt of \$1,481.99.

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In *Roberts v. Victor*, 130 N. Y., 585, it was held that \$13,501 was secured under the term "about \$12,000."

In *Bumpas v. Dotson* the deed of trust provided for a debt of about \$2,000. It proved to be only \$1,040, and the Court held that the discrepancy did not constitute evidence of intentional fraud, so as to vitiate the deed or exclude the debt.

None of the cases cited go to the extent to which we are asked to go in this case, and we think that the holding of the Court of Chancery Appeals on this feature of the case is correct.

The complainant will, however, after receiving the amount of \$1,500 and interest, as preferred under Class D, be allowed to prove the remainder of his debt and interest, and receive *pro rata* payment under the provision made for Class E. This he is entitled to under the prayer for general relief, and with this modification the decree of the Court of Chancery Appeals is affirmed. We do not think he is entitled to prorate upon his whole debt, but only on the balance after he has received the amount of \$1,500 and interest as preferred in Class D.

Waller v. Martin.

WALLER v. MARTIN.

(Nashville. February 2, 1901.)

1. HUSBAND AND WIFE. *Husband's interest in wife's lands.*

The surviving husband has no interest or estate, as tenant by the curtesy or otherwise, in lands in which his deceased wife held only a life estate. (*Post*, pp. 342, 343.)

Cases cited: *Beecher v. Hicks*, 7 Lea, 207, 214; *Alexander v. Miller*, 7 Heis., 81; *Bigley v. Watson*, 98 Tenn., 353; *Stovall v. Austin*, 16 Lea, 700, 706.

2. WILL. *Devise gives life estate with remainder over to children.*

A devise of lands to testator's daughter "to have and to hold during her natural life, and at her death to go to her legal heirs," does not give the daughter a fee simple title, but only a life estate, with remainder to her children or their descendants. "Legal heirs" in this devise is equivalent to "children and their descendants." (*Post*, pp. 343-346.)

Cases cited: *Alexander v. Wallace*, 8 Lea, 572; *Ingram v. Smith*, 1 Head, 426; *Gosling v. Caldwell*, 1 Lea, 454; *Boyd v. Robinson*, 93 Tenn., 34.

3. SAME. *Does not give absolute power of disposition.*

Absolute power of disposition is not conferred upon a devisee to whom lands are given for her natural life, with remainder to her children, by a subsequent provision giving her power to sell the lands, if she should at any time desire to do so, but requiring her to reinvest the proceeds in other lands, taking deed for same to herself for life, with remainder to her children, and appointing a trustee to see that this part of his will is strictly complied with. (*Post*, pp. 343-346.)

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Cases cited: *Bradley v. Carnes*, 94 Tenn., 27; *Young v. Ins. Co.*, 101 Tenn., 311.

FROM WILSON.

Appeal from Chancery Court of Wilson County.
J. S. GRIBBLE, Ch.

MCCLAIN & MCCLAIN for Mrs. Omohundro's children.

CANTRELL & McMILLAN for Martin.

WILKES, J. The question in this case is to determine the rights of R. J. Omohundro to a homestead in certain real estate in controversy.

The contest arises between the heirs at law of his wife, Mary E. Omohundro, and a creditor of the husband who had levied upon the interest of the husband in the land and sold it upon the theory that he had a life estate in it as tenant by the curtesy.

The present proceeding is by the heirs of Mrs. Omohundro to enjoin further proceedings to set apart such homestead, upon the theory that upon the death of Mrs. Omohundro the property descended to them, and that Mrs. Omohundro had but a life estate in the premises, and her sur-

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viving husband could not have, therefore, any estate as tenant by the curtesy in them.

The Chancellor held that the husband had no estate by curtesy in the land, and the Court of Chancery Appeals affirmed this holding and enjoined the proceedings to set aside homestead, vacated the sale and declared and adjudged the children of Mrs. Omohundro to be the owners of the land in fee simple, and removed the clouds created by the condemnation and sale proceedings from the title. The creditor has appealed to this Court.

If Mrs. Omohundro had only a life estate in the land, with remainder to her children, her entire interest in the land would cease with her death, and there would be nothing in which the husband could have an estate by curtesy. *Beecher v. Hicks*, 7 Lea, 207, 214; *Alexander v. Miller*, 7 Heis., 81; 2 Kent's Commentaries, 134; *Bigley v. Watson*, 14 Pick., 353, 358; *Stovall v. Austin*, 16 Lea, 700, 706.

The title of Mrs. Omohundro was derived under the will of her father, which contained this clause: "I give and bequeath to my daughter, Mary F. Omohundro, my farm near the grade in the twenty-third civil district of Wilson County, Tennessee [describing it], to have and to hold during her natural life, and at her death to go to her legal heirs. Now I intend, and hereby will and direct, that all the lands I give to my

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daughters shall be under her control and free from the debts of her husband, but should any of them at any time desire to sell their lands, they may do so provided they reinvest the proceeds in other lands, taking a deed to her and her legal heirs with the same provisions contained in this will, and I hereby appoint my son, Joshua C. Logue, trustee, to see that this part of my will is strictly complied with."

It is insisted that such a power of disposition is given to Mrs. Omohundro by this will as must vest in her an absolute estate in the land. We think this position is not well taken, since the power of disposition is restricted to a sale for reinvestment on precisely the same terms under which the original property is held. It is not an unlimited power of disposition, and the case is not brought within the rule laid down in *Bradley v. Carnes*, 10 Pick., 27.

A general discussion of the subject of limited and unlimited estates in the first taker is there had, and need not be here repeated.

The case of *Young v. Insurance Co.*, 17 Pick., 311, 314, was where there was a devise to a mother for life with power to sell for reinvestment, and it was held that the power did not convert the estate into a fee nor cut off the remainder interest.

So in the present case there is no power in the life tenant to defeat the remainder, for a

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sale could only be made for reinvestment, and a trustee is appointed to see that this shall be done in a particular mode.

It is said, however, that the terms used in the will vest a fee simple estate in Mrs. Omohundro. In other words, that the phrase "to go to her legal heirs," means that the property shall descend to the persons who, under the law, will answer the description of heirs, and if her "children" are the "heirs," they will take under the laws of descent, and not as purchasers under the will, and this being so, under our statute, the estate vesting in a party and her heirs would at once be converted into an estate in fee simple in the first taker. In this connection the rule is invoked that where a party would take by descent the same estate that a devise purports to give him, then the law presumes that he takes by descent and not by devise. 4 Kent, Sec. 506.

Unquestionably, in the absence of any statutory provision, if an ancestor devise to his heir just the estate in quality and quantity which he would take by descent, the latter will be considered as holding by descent and not by devise. 3 Washburn Real Property, side page 414, also side page 699.

But Mrs. Omohundro did not take under her father's will the quantity and quality of estate she would have taken by descent, but she took a life estate only. Under the statutes of de-

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scent her children would have taken nothing from the grandfather, but under the will they take an estate in remainder.

In the connection in which it is used in this will the expression "legal heirs" is equivalent to children or their descendants. The term "legal heirs" is frequently held from its connection to mean children. See the question discussed in *Alexander v. Wallace*, 8 Lea, 572; *Ingram v. Smith*, 1 Head, 426; *Gosling v. Caldwell*, 1 Lea, 454; *Boyd v. Robinson*, 9 Pick., 34, and a large number of cases there cited.

We are of opinion, therefore, that Mrs. Omohundro took only an estate for life in the lands in controversy, and her children took the remainder interest as purchasers, and not by descent, and the surviving husband had no estate by curtesy in the lands.

The decree of the Court of Chancery Appeals is therefore affirmed.

Insurance Co. v. Fox.

INSURANCE Co. v. Fox.

(Nashville. February 2, 1901.)

1. INSURANCE, LIFE. *Incontestability of policy.*

A life policy is incontestable on account of any false or fraudulent statement or representation contained in the application or medical examination, upon faith of which it was issued, where this provision occurs in the conditions indorsed upon it, to wit: "Except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age." The exception to incontestibility refers to and includes only the matters indorsed on the policy that precede the clause quoted, and does not embrace anything contained in the application or medical examination. (*Post*, pp. 355-357.)

2. SAME. *Same.*

A provision or stipulation in a life policy that it shall be incontestable on account of any false or fraudulent statement or representation contained in the application or medical examination upon faith of which it was issued, is not void as being against public policy. (*Post*, pp. 352-355.)

Case cited: *Clements v. Insurance Co.*, 101 Tenn., 22.

3. CHARGE OF COURT. *Proximate cause.*

The charge of the Court is correct and sufficient, without addition, which, in substance and effect, instructs the jury that there can be no recovery upon a life policy if voluntary starvation caused or hastened the assured's death, although he may have been at the same time fatally ill with scurvy, of which he would have eventually died. (*Post*, pp. 357, 358.)

FROM RUTHERFORD.

Appeal in error from Circuit Court of Rutherford County. W. C. Houston, J.

Insurance Co. v. Fox.

PALMER & RIDLEY for Insurance Co.

J. E. RICHARDSON for Fox.

WILKES, J. This is an action upon a life insurance policy. It is brought by Mrs. Susie E. Fox, the widow of the assured and the beneficiary named in the policy. It was issued September 10, 1898, and the insured died December 12, 1898, or about three months after the issuance of the policy. The cause was tried before a jury in the Court below, and there was judgment for \$2,078.35, the amount of the policy, and the company has appealed and has assigned errors.

Passing over the details of the pleadings, the principal question presented to this Court is whether, under the terms and stipulations of the policy, fraud perpetrated by the insured in procuring the policy is available as a defense to a recovery upon it. Upon this feature the Court charged the jury as follows:

“It [the company] further files several pleas alleging fraud in procuring the policy, and alleging that the assured, Jno. E. Fox, falsely answered questions propounded to him in his application for insurance, to wit:

“As to the sanity or insanity of his father, himself, and his sister, and as to his previous illness, as set out in its pleas. You are instructed that if you find the policy introduced in

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evidence to be the contract of insurance, then the defendant would be estopped from relying upon such defenses, and would be held to have waived them."

It is insisted this instruction was erroneous, and it presents the question now to be considered. In the face of the policy the following provisions appear, to wit:

"On consideration of the statements made in the application for this policy, which application is hereby made a part of this contract," etc.

Again, "This policy is issued and accepted subject to the benefits, provisions, and conditions on the second page hereof, which are made a part of this contract."

Turning to the application we find the following provisions which are pertinent and proper to be considered:

"1. It is hereby agreed and warranted that should the company issue a policy upon this application its interest shall not be affected by verbal statements made to its agents or others, or by the knowledge of such agent, but it shall be affected only by the statements herein made, including those made to the medical examiner, which are hereby warranted to be full and correct as facts, and they shall constitute the basis of any policy which may be issued hereon.

2. In the statement to the medical examiner it is said: "I hereby further declare that I have

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read and understand all the above questions put to me by the medical examiner, and the answers thereto, and that the same are true, and that I am the same person described as above, and I hereby warrant that there is not and there has not been any concealment of facts regarding my past and present state of health and habits of life or my personal history."

The conditions referred to as being on the second page of the policy are as follows:

"1. The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and nullify this policy, without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy are hereby made a part of this contract of insurance.

"2. No suit to recover under this policy shall be brought after one year from the death of the insured.

"3. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the in-

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sured should die by self-destruction, whether sane or insane, within three years from the date hereof, this policy shall be null and void, and in case of said avoidance the reserve value only, according to the actuaries' table of mortality, with four per cent. interest, shall be paid on the surrender of this policy. Except as hereinbefore provided, this policy shall be incontestable for any cause except misstatement of age. In case the age of insured shall have been misstated, the amount payable hereunder shall be such proportion of the sum insured as the premium paid bears to the required premium at the correct age of the insured."

The real controversy arises out of the true meaning and proper construction of the phrase, "except as hereinbefore provided." It is said by the company that the phrase applies to and embraces everything contained in the face and on the back of the policy coming before this excepting clause; in other words, it embraces not only the conditions set forth on the second page, but also the warranties and representations made in the application and on the face of the policy on its first page. The different results reached by these different constructions are apparent at a glance. If the phrase is limited to the conditions set out on the second page, then the policy is contestable only for a breach of those conditions, while under the other construction it would

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be contestable for any fraudulent misstatement by assured in the application and medical examination.

It is further stated that if the clause should be so construed as to make the policy incontestable for fraud in obtaining it, then the contract itself would be void, because contrary to public morals and a sound public policy.

The question involved in this controversy was before the Supreme Court of Iowa in the case of *Verona H. Welch v. The Union Central Life Insurance Company*. In that case the policy involved was the same as in the present case, issued by the same company. That Court held that the phrase, "except as hereinbefore provided," applied not only to the conditions indorsed on the second page of the policy, but also the application and the statements contained in it, and that to hold the policy incontestable for fraud would be to deny any effect to the warranty and agreement of the applicant, while to hold otherwise gives full effect to all parts of the contract.

That Court says if the policy may never be contested for fraud in its procurement, why include the warranty and agreement in it? That Court also intimates that a provision in a policy that it should not be contestable for fraud would be void, and render the contract itself invalid.

The Court also draws a distinction between

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policies which are by their terms to become at once incontestable and those to become incontestable only after a certain length of time, and intimates that the latter cases may be sustained, and that fraud will not defeat such policies after the time limited, because the company has reserved to itself the delay which it deems necessary to detect and discover the fraud, and if it has not been discovered and defended against in that time, it may not be afterward set up. In this latter class falls the case of *Clements v. The Insurance Co.*, 17 Pickle, 22. See the same case reported in 42 Lawyers' Reports Annotated, p. 247. It is conceded that this case is correctly decided, but it is said that the present case, as well as the case from Iowa, is to be distinguished from it by the fact that in the *Clements* case a period of one year was reserved by the company in which it might make such investigations as it deemed proper, and, if dissatisfied, might cancel the policy, while here no time is reserved. It will be noted that this is a confession that fraud will not prove a defense after the expiration of one year; so that this concession, as well as the holding in the *Clements* case, goes to the extent that fraud in procuring the policy does not render it void but only voidable within the time stipulated. If the time may be limited to one year within which the defense of

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fraud may be made available, it is difficult to see why it may not be limited to six months or one month, or such other time less than this as the company may deem it important to stipulate.

If fraud may be waived at all, certainly the parties may stipulate the grounds upon which the waiver may be made, and if a company can stipulate that its policies shall be incontestable, it may fix the conditions upon which inconstestability shall rest, and may fix a time limit upon the right to contest.

We think that a consideration of the manner in which insurance is effected and policies are written, will remove much of the difficulty in determining the proper decision of this case. When a party applies for a policy, he is required to make an application, and in it to reveal and state everything that the company deems material to the risk. A large number of questions are put to him to elicit the facts. These questions are framed by the company, and he is obligated by the terms of his application to commit no fraud and make no material mistake in answering them. Not only so, but the company by its own medical examiner subjects the applicant to a physical, personal examination, and to a course of questions calculated to bring out and make plain his physical history and condition.

With this statement of the applicant, and report of its own examiner before it, the company

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has the privilege of making such investigation as it may deem proper. It is under no obligation to come to a conclusion in any definite or specified time. If it desires a week it may take it; if a month or a year, it may suspend its acceptance until that time expires.

We can see no difference in principle between the present case and the Clements case. In that case the company stipulated for twelve months' time after it issued its policy; in the present case it took the time it deemed necessary before accepting the policy. It may, therefore, well be held to have waived the effects of fraud, since it had such time to discover it as it saw proper. We can therefore see no good reason why these parties may not have entered into such contract if they saw proper so to do. Joyce on Insurance, Sec. 3732.

We are not passing upon the wisdom of such a provision, but upon the rights and liabilities of the parties if it has been made. But the question remains, Did the company intend to cut itself off from the defense of fraud in obtaining the policy?

In the Clements case the incontestable clause read as follows: "After the policy shall have been in force one full year, if it shall become a claim by death, the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed."

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This is a broad provision, and leaves the policy contestable alone upon the ground of nonpayment of premiums.

Now, in the present case, it is evident that the company intended to stipulate that it would not contest the policy upon any ground except misstatement of age, and "except as hereinbefore provided." We cannot construe this exception as leaving the company an option to contest the policy for any matter contained in the application and medical examination, but only for such matters as are stated in the conditions indorsed upon it. These conditions are, in brief:

1. Failure to pay premiums as agreed upon.
2. Bringing suit within one year after the death of the insured.
3. The entrance by insured into military or naval service, engaging in saloon business, death by self-destruction within three years.
4. Misstatement of age.

To hold that all the statements made in the application are to be excluded from the clause of incontestability would be to deny any scope or effect to that clause.

These statements of the application and examination contain all the grounds of contest of which the policy is susceptible, so far as its terms are concerned. If they are all excepted, and contest may be made upon any or all of them, then the noncontestable clause has no opera-

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tion whatever. Of course the clause does not embrace a matter which is outside of the terms and conditions of the policy, such as nondelivery, forgery, false impersonation, etc., as these matters would go to the question of title, and not mere fraudulent or false misstatement in the policy itself.

The true meaning is that no defense will be interposed by reason of the terms and form of the policy except those embraced under the head of conditions, including the express provision as to misstatement of age. To illustrate, the company might defend under the policy on the ground that plaintiff was not dead; that the policy had never been delivered; because such defenses do not amount to the contest of the terms, provisions, conditions, and stipulations of the policy.

We are of opinion that the causes set out in the "conditions," and the misstatement as to age, are the only grounds upon which the company, under the terms of this policy, has the right to contest liability, and it has waived the right to make any contest on any other ground covered by the terms and provisions of the policy.

We can come to no other conclusion, and give any effect to this clause in reference to non-contestability, nor to give effect to the different provisions of the policy.

It is assigned as error that the Court refused to charge, upon defendant's request, that "if Jno.

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Fox was desperately ill from scurvy, and became weary of life, and deliberately undertook to starve himself to death, and the scurvy and starvation jointly caused his death, there can be no recovery in this case."

The defendant had already made two requests bearing upon this feature of the case, both of which were given, and are as follows:

"If John Fox refused to take nourishment, and the proximate cause of his death was starvation, and he refused to take nourishment in order to bring about that result, there can be no recovery by plaintiff in this case. That would be so although John Fox may have been so sick from scurvy that it would ultimately have caused his death. If John Fox was fatally ill with scurvy, and his death was hastened by such starvation, there can be no recovery by plaintiff."

Again, "If John Fox was desperately ill with scurvy, and became weary of life, and deliberately starved himself to death, there can be no recovery by plaintiff in this case.

"If the lack of nourishment was the proximate cause of his death, this would be so even though he was so afflicted with scurvy that it would have ultimately resulted in his death."

This, we think, is ample on this feature of the case, and embraces the request refused.

We can see no error in the proceedings and judgment of the Court below, and it is affirmed with costs.

State v. Moss.

STATE v. MOSS.

(Nashville. February 2, 1901.)

REASONABLE DOUBT. *Erroneous definition of.*

It is fatal error in a felony case for the Court to define reasonable doubt in his charge as an inability, after full investigation and consideration of the evidence, "to let the mind rest easily upon the certainty of guilt or innocence." The clause "or innocence" should be omitted.

FROM DEKALB.

Appeal in error from Circuit Court of DeKalb County. M. D. SMALLMAN, J.

Attorney-General PICKLE, CLARENCE GARRETT, and DRAKE BROS., for State.

H. C. SNODGRASS and WADE & WILLIAMS for Moss.

WILKES, J. Defendant is convicted of murder in the second degree, and sentenced to ten years in the State penitentiary, and has appealed.

It is said on behalf of the State that there is no legal bill of exceptions in the case. This is true as to the record, as originally presented, inasmuch as the bill of exceptions did not appear

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to have been signed by the trial Judge, nor to have been filed within the thirty days allowed by order of the Court.

Upon a suggestion of diminution of the record these defects have been supplied and remedied, and the transcript has been perfected.

Several errors are assigned, one that the verdict is not supported by the evidence, and again that there are errors in the charge of the Court.

The Court, in defining reasonable doubt, said: "By reasonable doubt is not meant that which of possibility may arise, but it is doubt engendered by the investigation of the whole proof, and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt or innocence."

This is error, no doubt inadvertently and unwittingly committed by the learned trial Judge, in requiring that the mind shall rest easily upon the certainty of innocence before the defendant can be acquitted. The law presumes that the defendant is innocent until his guilt is proven beyond a reasonable doubt. But no defendant is required by the evidence to show such facts as will cause the jury to believe him innocent, and to rest easily upon the certainty of such innocence.

This is such error as must cause the reversal of the judgment of the Court below, and the cause is remanded for a new trial.

The State will pay costs of appeal.

Moore v. Tillman.

MOORE v. TILMAN.

(*Nashville.* February 9, 1901.)

1. CHANCERY PLEADING AND PRACTICE. *Complainant's right of dismissal.*

It is a general rule, though not of universal application, that a complainant may, as a matter of course, dismiss his bill at any time before final decree, upon payment or assumption of all costs. (*Post*, pp. 363, 364.)

Cases cited: *Gillespie v. McEwen*, 1 Shan. Cas., 400; *Stone v. Huggins*, 1 Shan. Cas., 564; *Partee v. Goldberg*, 101 Tenn., 664; *Allen v. Dayton, etc., Co.*, 95 Tenn., 480.

2. SAME. *Same.*

Complainant's right to dismiss his bill is not defeated by the filing of defendant's answer as a cross bill, where no cost bond is given, no process issued, no appearance entered, and no answer thereto filed, although proof may have been taken on the issues presented by the bill and answer. (*Post*, pp. 364-366.)

Cases cited: *Partee v. Goldberg*, 101 Tenn., 664; *Allen v. Dayton, etc., Co.*, 95 Tenn., 480.

3. SAME. *Answer not effective as cross bill, when.*

An answer, though framed and filed as a cross bill, is not effective as such where no cost bond is given, no process issued, no appearance entered, and no answer thereto filed. (*Post*, pp. 364-366.)

Cases cited: *Harrell v. Harrell*, 4 Cold., 377; *Curd v. Davis*, 1 Heis., 574; *Hall v. Fowlkes*, 9 Heis., 745; *Keele v. Cunningham*, 2 Heis., 288.

FROM MAURY.

Appeal from Chancery Court of Maury County.
J. W. EWING, Sp. Ch.

Moore v. Tillman.

H. P. FIGURES and L. P. PADGETT for Moore.

J. C. VOORHIES and W. J. WEBSTER for Tillman.

WILKES, J. The original bill in this cause was filed to enforce a vendor's lien upon land for unpaid purchase money. There was an answer to the bill, in which the defendant set up that a fraud had been perpetrated upon her, in that while one tract of land was pointed out to her as the land sold, in fact another and very inferior tract was conveyed, and this fact was not discovered until after a cash payment had been made, which was fully as much as the tract conveyed was worth. The answer, after setting out the fraud in detail, prayed, in substance, that she be held not liable for the notes, and that she have an account and recover what she was injured by the fraud.

She asked that the answer be taken as a cross bill; that process issue, and complainant be required to answer it, but not under oath, and that she have judgment for whatever might be shown to be justly due her on the basis of the answer and cross bill.

No bond for costs was executed; no process issued under the prayer of the cross bill, and it was not answered. Proof was taken however, mostly on the part of complainant, the defendant

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giving her testimony only, and producing no other witness. When the cause was regularly reached for trial upon the docket, complainant announced that he was not ready for trial, and asked for a continuance. This was refused, when complainant offered to take a nonsuit; to which defendant objected, and the cause was heard, as is stated in the decree, on the bill, answer, cross bill, or answer filed as a cross bill, exhibits and proof, and a decree was rendered for defendant that she was owing complainant nothing on the sale of the land, and was entitled to a cancellation of her notes, and to retain the land deeded to her, and costs were divided equally. Complainant appealed, and the Court of Chancery Appeals reversed the decree of the Chancellor and dismissed the bill at cost of complainant, and taxed the cost of appeal to the defendant. The defendant has appealed to this Court, and the question which this Court is asked to pass upon is whether it was error in the Chancellor to refuse complainant the right to dismiss his bill and take a nonsuit, as he proposed to do. The general rule of practice is that a complainant may dismiss his bill as a matter of course at any time before decree is rendered, upon payment of costs. *Gillespie v. McEwen*, 1 Shannon, 400; *Stone v. Huggins*, 1 Shannon, 564.

The general rule is, however, subject to many exceptions. A dismissal cannot be had after a

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decree has been entered adjudicating rights, or when a decree has ordered an account upon principles laid down, or when an issue has been made up and tried by a jury, or when a cross bill has been filed, or an answer as a cross bill seeking affirmative relief, and it has been answered and issue made. *Partee v. Goldberg*, 17 Pickle, 664. Or when a creditor seeks to set aside a trust deed and sale under it as fraudulent, and also attacks the validity of a tax title under which the purchaser at the sale under the trust deed also claims title, he cannot on the hearing dismiss his bill so as to throw the burden of proving its validity on defendant. *Allen v. Dayton Hotel Co.*, 11 Pickle, 480.

We are of opinion, from these authorities, that if this were a cross bill proper, or an answer as cross bill which had itself been answered, the decree of the Court below refusing to allow the dismissal would be based upon authority as well as reason.

But the question is made that this answer should not be given the effect of a cross bill, or an answer as a cross bill.

In *Harrell v. Harrell*, 4 Cold., 377, it was held broadly that the Court could take no notice of a paper filed as a cross bill if no bond was filed.

In *Curd v. Davis*, 1 Heis., 574, it was said that an answer prayed to be taken as a cross

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bill might be treated by the Chancellor as an answer only, and in the case of *Keele v. Cunningham*, 2 Heis., 288, it was said that when no bond was given, and no process issued, the answer could not be entertained as a cross bill. But in *Hall v. Fowlkes*, 9 Heis., 745, it was held that an answer filed as a cross bill might be entertained as such, even though no bond should be given and no process issued, if the complainant should file an answer to the cross bill, the Court saying that the filing of an answer, without objection, for want of cost bond or process was a waiver of those matters. In commenting on the cases in 4 Cold. and 2 Heis., to which we have referred, the Court in 9 Heis., 753, said. "In neither case does it appear that there was any appearance to the answer as a cross bill by filing an answer thereto or otherwise." From this language it appears that the Court in the 9 Heiskell case was of opinion the irregularities in the cross bill, or answer as a cross bill, could be waived not only by an answer, but otherwise, but it is not stated in what other way the waiver may be made. In the present case there was no answer filed, but the parties took proof upon the matters set up in the answer alone, none of it pertaining to the matters set up in the bill.

The majority of the Court is of opinion that this could not be considered a waiver of irregularities, so that the defendant's answer could be

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treated as a cross bill; that until the cross bill was answered or taken for confessed, it could not be made the basis of any affirmative relief. While the evidence introduced was therefore competent upon the issues made by the original bill, and answer thereto treated as an answer, it could not be considered as converting the answer into a cross bill. This being so, the complainant had a right to dismiss his bill at his own costs at any time before trial, and this would take with it the answer of the defendant, and the decree of the Court of Chancery Appeals is affirmed.

I do not concur in this view, but think that when the complainant took proof upon the matters set up in the cross bill, without objecting to it, he waived the irregularities, and the case must be treated as if the answer to the cross bill had been filed and the matters set up in it had been put in issue. In that event it is true the complainant might still dismiss his original bill, but the defendant, under his answer as a cross bill, had the right, nevertheless, to proceed to obtain such affirmative relief as he was entitled to under its allegations and the proof.

Williams v. Gobble.

WILLIAMS v. GOBBLE.

(Nashville. February 9, 1901.)

1. **EVIDENCE.** *Of previous condition of platform whose defects caused plaintiff's injury, admissible.*

It is competent for the plaintiff to prove the existence, on the day before his injury, of the defect, to wit, a hole in the platform, which caused the injury sued for. (*Post*, pp. 369, 370.)

2. **MASTER AND SERVANT.** *Fellow-servants.*

Servants of different masters, though engaged in the same general work, are not fellow-servants—*e. g.*, the driver of the horse power of a wheat thresher, employed by the owner of the machine, is not a fellow-servant of a boy employed by the owner of the wheat being threshed to carry water to the hands engaged in the work. (*Post*, pp. 371–373.)

3. **SAME.** *Master's liability for servant's acts.*

Unless the servant acts in the particular matter under the express or implied authority of his master, the latter cannot be held for his acts. Hence the owner of a wheat thresher cannot be held for the act of his servant, the driver of the horse-power, to whom no authority over others has been delegated, in requesting a boy, employed by the owner of the wheat being threshed, to approach him, while the machine was in motion, thereby sustaining serious injury. (*Post*, pp. 372, 373.)

FROM LAWRENCE.

Appeal in error from Circuit Court of Lawrence County. SAM HOLDING, J.

Williams v. Gobble.

W. R. KING and J. B. GARNET for Williams.

R. B. WILLIAMS and J. B. WAGSTAFF for Gobble.

WILKES, J. This is an action for damages brought by a father for injuries to his minor son. There was a judgment in the Court below for \$1,000 for the plaintiff, and defendants have appealed.

It appears that the defendants were operating a horse power wheat threshing machine in Lawrence County, and Joel Williams, a lad of about thirteen years of age, was engaged in bringing water to the hands, who were attending the thresher. The boy, in passing between the levers to which the horses were attached, in order to give water to the driver (who stood upon a platform erected over the center of the machinery), was caught and badly crippled by the levers or other apparatus forming a part of the motive power of the thresher.

There are three counts in the declaration. One that there was a defect in the platform on which the driver stood, and when the boy stepped upon it his foot slipped through a hole in the floor, and was caught by the revolving machinery and injured.

The other two counts appear to be based upon the theory that the water carrier was directed by the driver to bring the water to him on the

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platform while the machinery was in motion, and that this order was attended with danger, and this would make the master responsible.

The theory of plaintiff is that he is entitled to recover—

1. Because of the dangerous order given by the driver, especially to one of tender years, and in view of the dangerous character of the machinery.

The defendants contend that they are in nowise responsible for the injury done; that there was no hole in the platform; that they are not responsible for the order of the driver, because in the first place no such order was given, and, in the second place, if given, it was the request of the driver, for which the defendants were not responsible.

In the additional assignment filed it is stated that there is no proof of the nature and value of the boy's earning capacity, and that the verdict, in any event, is excessive, and there is no evidence to sustain it. It appears from the record that the defendants furnished the machinery and the driver and horses, but that the hands necessary to handle the wheat and wait upon the machine were furnished by the parties whose wheat was being threshed. There is a conflict in the evidence as to whether there was a hole in the platform. The plaintiff and his son testify that there was, and several witnesses testify there was

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such a hole the day before, and that defendants' attention was called to it. It is also stated that the platform was exhibited to the jury, and there was a hole in it, and the dimensions are given. The testimony as to the condition of the platform on the day before was objected to, on the ground that it should have related to the exact time of the accident. One of the defendants testifies that this hole had been closed two or three days before the accident. He admits that some one called his attention to it, but does not remember who. Williams, the father, states that he called defendants' attention to it the day before.

We think there was no error in the admission of this testimony, and that there is sufficient proof, under the rule, to warrant the jury in believing that the platform was defective, if this were all. The exceptions to the testimony are general, and not specific, that the platform was defective. There is also proof of the boy's age; proof of medical expenses incurred, and proof of the nature and extent of the injury sustained, and of the earning capacity of the boy. The injury resulted in the amputation of the left leg about four inches above the knee. It is true there is evidence tending to show that the platform was not defective; that the boy needlessly stepped upon it, and of his own motion, and not at the direction of the driver, but the questions of fact were fairly sub-

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mitted to the jury, and it found for the plaintiff.

Upon the feature of the case presented by the second and third counts of the declaration there is more difficulty. That it was not a place of safety to which the boy went fully appears from the record. To pass between the levers among the horses and into the network of machinery with the moving levers revolving around and over the braces, stays, cogwheels, etc., was an obviously dangerous experiment, and one the danger of which the jury may have been justified in believing that the plaintiff, on account of his age and want of experience, was not sufficiently informed. The Court, in effect, charged that the boy was not a fellow servant with the driver, if the former was employed and furnished by the owner of the wheat, but that if he was injured while complying with the directions of the driver, and while exercising due care himself, then the defendants would be liable, and this would be the case whether the platform was or was not defective, and upon the idea that the service required of the boy was dangerous, and inviting or ordering him into the place of danger was negligence.

We think there is error in this charge, in this: We are of opinion the driver and water carrier were not fellow servants, since they were employed by different masters, and in this respect the charge

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was correct. But it does not follow that the owners and operators of the machinery are liable for the acts of the driver. In order that the result should follow, it must appear that the driver had some sort of delegated authority or superintendence over the other laborers at the thresher, at least over the water carrier, and that in directing him he stood in the place of or acted for the defendants either by express or implied authority. In the present case it affirmatively appears that the driver was employed simply to drive the horses and keep the motive power in motion. He had no authority from defendants over the other employees; no right to direct them; none to control them. It also appears that one at least of the owners of the thresher was present, and it does not appear that the boy went into the place of danger at his request, or even with his knowledge. It further appears that the owners of the machinery went about over the country with their thresher, threshing out wheat for the farmers. The defendants furnished the machinery, horses, and driver, while the owners of the wheat furnished such labor as was necessary to handle the wheat, and among others this boy was employed or engaged to carry water. But it does not appear that the driver had any authority or superintendence over any other employees working about this thresher. It does not appear that he had any right to order

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or request any particular service of any other employee, and if he did so, he was not, in so doing, standing in the place and doing the work of the master, as he had no such authority. The Circuit Judge was in error, therefore, in charging, as he did, that if the driver and water carrier were not fellow servants, that then the defendants would be liable for the acts of the driver, but he should have coupled it with the further condition that the driver must have been shown to have some authority or superintendence over the other employees delegated to him by the defendants, and that the act he did was in the scope of his authority. It is alone upon this ground that the liability of the master would attach for the act of the servant. It is not necessary to pass upon the other features of the case argued before the Court, for the instruction given by the trial Judge was calculated and altogether sufficient to warrant the jury in fixing liability upon the defendants whether the driver had any authority or superintendence over the other hands or not, and whether the platform was or was not defective.

For this error the judgment of the Court below is reversed, and cause remanded for a new trial.

Appellee will pay the cost of appeal.

Fleming v. Railroad.

FLEMING v. RAILROAD.

(Nashville. February 9, 1901.)

RAILROADS. *Liability for injury to person on its track.*

The general rule that a railroad company is not bound, in the operation of its trains, to anticipate the presence of a trespasser nor to provide for his safety, when his presence is not known, does not excuse it from the exercise of ordinary care to observe the presence of persons on its track, and to save them from injury by its moving trains or cars, when such persons are using the company's tracks from necessity or by permission, and in accordance with a long-continued custom, on business at a depot, and the company therefore had reason to expect their presence on its tracks.

FROM MAURY.

Appeal in error from Circuit Court of Maury County. HON. SAM. HOLDING, J.

JAMES A. SMISER for Fleming.

GEO. T. HUGHES for Railroad.

WILKES, J. This is an action for damages for personal injuries. There was a trial before a jury in the Court below, and a verdict and judgment for \$900, and the defendant railroad company has appealed and assigned errors.

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The facts, so far as necessary to be stated, are that Fleming was at the depot in Columbia, Tennessee, on some business for his employers, who were expecting some shipments by the morning express train.

He went upon the tracks of the company to talk to the watchman in the employ of the company, whose duty it was to look after the safety of passengers and other persons at the depot and on the grounds of the company. The watchman was sitting on the steps of a caboose, which was standing on the tracks with several other cars attached, but to which there was no engine attached.

Plaintiff was told that the train was late, and he engaged with the watchman in a conversation, and afterwards with another person who came up. In the meantime the watchmen had stepped to the telegraph office, only a few feet away, to learn when the train would arrive. The entire space between the tracks, and there were several at this place, was level, and the public generally, as well as passengers, were in the habit of going upon it when it was not being used for passing trains, and especially when awaiting the coming of trains. It was more or less crowded all the time by persons standing upon or passing over it.

While standing near the caboose, and partially on the track behind it, an engine which had

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been engaged in switching pushed some cars down the track on which the caboose was standing, and they ran against the caboose and standing cars, and they were jammed back and struck the plaintiff, knocking him down and rendering him for awhile unconscious. He suffered greatly with his head from the concussion, and for some month or two was wholly disabled from work, and at the time of the trial was still suffering very much from the injury.

It appears that these cars which came down the track and jammed those standing upon it were cut loose from the switch engine and shunted down the track about one hundred yards, and, the track being a down grade, they continued to roll down it of their own momentum until they struck the standing cars. One brakeman was upon them, and had set one of the brakes and started to the other when the accident occurred, but he did not see the plaintiff, and his situation was such that he could not see him. The cars came down the track quite rapidly, and struck the standing cars with force and pushed them some distance down the track.

There are several objections made to the charge as given, and several to the failure to give several other instructions as requested.

The Court laid down the rule of law applicable to the company's duty to a licensee that it was incumbent on it to keep the walkways, plat-

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forms, and standing places reasonably safe for the use of such persons, and proceeded to say that if a party be a trespasser it would not prevent him from recovering from the company for injuries negligently inflicted by the railroad company and which might be averted by using ordinary care and caution by the railroad, but this was true only in cases where the negligence of defendant was the direct and proximate cause of the injury.

The insistence of the counsel for the company is that it is not required to anticipate the presence of a trespasser, nor to guard against injury to him unless his presence is known to the company, and it then failed to use proper care. While as a general proposition this may be correct, still it is not applicable in a case where cars are being moved over tracks and yards, and in localities which the public is accustomed to frequent, and where the road may reasonably expect that persons may be in the way of moving trains or cars at any time.

The mere fact that the company was ignorant of the presence of the party, whether licensee or trespasser, would not absolve the company from liability, but the controlling question is whether it would depend largely upon the circumstances, the company was negligent or not, and that question was used, and whether much or little frequented by third persons. If, for instance, the

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company should be pushing its cars along or over crowded streets and passways, it must keep a more vigilant lookout than if it were merely switching at a country station where persons were not accustomed to frequent. A different rule from this would place a premium upon the inattention and failure of the company to see persons who are exposed to danger. While the company, as against a licensee as well as trespassers, is entitled to the use of its tracks when it desires to use them, still when they are not continuously in use, and persons are allowed to go upon them between trains, it would be incumbent upon the road to see that its tracks were clear before moving its trains over them.

It appears that the place where this accident occurred had been used as a passing or standing place for a number of years, and was really necessary to be so used for the accommodation of passengers and persons having business at the depot. It does not therefore present the case of a person needlessly and heedlessly placing himself in front or rear of a car likely to be moved, and injured because the railroad had no actual knowledge of his presence.

The Court, as bearing on this feature of the case, charged that if plaintiff's negligence was the direct and proximate cause of the injury, he could not recover. The Court gave full instruc-

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tions as to the care required of plaintiff and the caution he must use to look and listen.

We think that the objections to the charge as given, and the requests as made, are faulty, in that the proper distinction is not made that is raised by the facts of the case, to wit: That the cars were being moved over premises which were frequented by the public at any and all times, and there was a duty resting upon the company to keep a close watchout for persons on or near the track, and this duty made it incumbent on the company to use all reasonable care and diligence to see that its tracks were clear, and a mere failure to see persons on the track would not be sufficient.

We think the charge as given was fair and full, and properly presented the case to the jury, and there being no errors assigned except as to the charge, the judgment of the Court below is affirmed with costs.

Lucas v. Malone.

LUCAS v. MALONE.

(Nashville. February 9, 1901.)

1. CHANCERY PLEADING AND PRACTICE. *Excluded evidence must be preserved by bill of exceptions.*

Evidence excluded by the Chancellor ceases to be part of the record unless it is restored and made such by bill of exceptions.

2. LIMITATIONS, STATUTE OF. *Bars resulting trust.*

Ten years bars suit to set up a resulting trust.

Cases cited: *Henderson v. Tipton*, 88 Tenn., 256; *Love v. Welch*, 88 Tenn., 259.

3. DESCENT AND DISTRIBUTION. *Half blood.*

D. died intestate, leaving to his two children a tract of land. Subsequently both of the children died intestate—one without issue and the other leaving one child. D. had married a widow, who had two children before her marriage to him. These children of the wife claimed to inherit title to an interest in said land with D.'s grandchild. *Held*: D.'s grandchild takes exclusive title.

Code construed: § 4163, Sub. § 3 (S.); §§ 3268–3270 (M. & V.); § 2420 (T. & S.)

Case cited: *Deadrick v. Armour*, 10 Hum., 588.

FROM SMITH.

Appeal from Chancery Court of Smith County.
T. J. FISHER, Ch.

J. J. FORD for Lucas.

FITE & AUST for Malone.

Lucas v. Malone.

WILKES, J. The bill in this case was filed in a double aspect, first to set up a resulting trust in certain lands, and, second, to assert an interest in the same lands by inheritance from Jas. H. Davis.

The Chancellor refused any relief, and dismissed the bill, and his decree was affirmed by the Court of Chancery Appeals, and the cause is before us on appeal by the complainants. As to the resulting trust feature of the case the Court of Chancery Appeals reports that considerable testimony was introduced, but that it was all hearsay and incompetent. It was objected to as incompetent, and excluded by the Chancellor, but was not preserved by bill of exceptions, and it is not before us, so that as to this the complainants fail to establish their contention.

In addition it appears that Jas. H. Davis died more than ten years before the present bill was filed, and their right to set up a resulting trust is barred by the statute of limitations. *Henderson v. Tipton*, 4 Pick., 256; *Love v. Welch*, 4 Pick., 259.

As to a claim of an interest in the land by inheritance, it appears that many years ago James H. Davis intermarried with Jane Lucas, who was then a widow, having two children by her first marriage—L. R. Lucas, one of the complainants in this cause, and John Lucas, who has since died, leaving the complainant, J. G. Lucas, his only heir.

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James H. Davis and Jane Lucas had two children by their marriage, to wit: Mexico Davis, who has since died leaving no issue, and Nettie, who has also died, leaving the defendant, Mamie Malone, as her only child and heir at law.

James H. Davis died in 1888. The land in controversy belonged to him at the time of his death, and was assigned to his widow as dower, the remainder of his lands having been sold to pay his debts. The widow died some two years before the bill in this cause was filed. Mexico Davis also died after her father, leaving Mamie Malone as her only heir.

The contention made is that complainants, who are the children and grandchildren of Jane Lucas by her first marriage, inherit this land equally with Mamie Malone, a grandchild under the second marriage.

The land was the property of the father, James H. Davis, and the complainants have failed to set up any resulting trust in it arising out of the investment in it of their mother's funds.

In such case the statute applicable is that embodied in Shannon's compilation as § 4163, Subsec. 3, as follows: "When the land came to the intestate by gift, devise, or descent from a parent, and he dies without issue, if he have brothers and sisters of the paternal line of the half blood, and brothers and sisters of the maternal line also of the half blood, then the land shall be inherited

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by such brothers and sisters on the part of the parent from whom the estate came in the same manner as by brothers and sisters of the whole blood, until the line of such parent is exhausted of the half blood to the exclusion of the other line." See, also, *Deadrick v. Armour*, 10 Hum., 588.

The result is that complainants, under the law, inherited no interest in the land, and have failed to prove any resulting trust in their favor. They are entitled to no relief, and the decree of the Court of Chancery Appeals is affirmed.

State v. McMinnville.

STATE v. MCMINNVILLE.

(*Nashville.* January 5, 1901.)

1. **CONSTITUTIONAL LAW.** *Title and subject of statutes.*

A statute with one general subject may embrace subdivisions, provisos, and exceptions pertinent to that subject to any extent that they can be grouped without incongruity. (*Post*, p. 389.)

Act construed: Acts 1899, Ch. —.

Constitution construed: Art. II., Sec. 17.

Cases cited: *State v. Brewing Co.*, 104 Tenn., 716, 717; *State v. Brown*, 103 Tenn., 455; *State v. Yardley*, 95 Tenn., 546; *Cannon v. Mathes*, 8 Heis., 519; *Garvin v. State*, 13 Lea, 166.

2. **SAME.** *Statute embraces a single subject, when.*

A statute whose general subject is the release of municipal corporations from liability to the State for certain taxes on litigation, that should have been, but were not, collected in their police courts, is not amenable to constitutional objection, as embracing more than one subject, because of its provisions that all pending actions for such taxes should be dismissed and that no new actions should be brought for same. The mandate to dismiss pending actions, and the prohibition against bringing new ones, are but parts of the same general subject. (*Post*, pp. 385-389.)

3. **SAME.** *Body of statute covered by its title, when.*

A statute is not amenable to constitutional objection, as embracing a subject or matter in its body that is not expressed in its title, which, under a title providing for a limitation upon the bringing of suits against municipal corporations for certain taxes, and the dismissal of pending suits for same, enacts that no action shall be brought for such taxes that accrued prior to a specified date, and that all pending suits

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therefor, and suits brought thereafter, in violation of the Act, should be dismissed. (*Post*, pp. 385-389.)

FROM WARREN.

Appeal from Chancery Court of Warren County.
WALTER S. BEARDEN, Ch.

Attorney-general PICKLE and I. W. SMITH for
State.

LIND & HOODENPYLE for McMinnville.

WILKES, J. The object and purpose of the bill in this cause is to recover State taxes on litigation, tried before the Courts of the town of McMinnville for offenses committed against the laws of that municipality.

It is averred that in a large number of cases tried before the Courts of that municipal corporation from May, 1881, to July 25, 1895, the officers trying such cases failed to tax up and collect a State tax upon the suits in causes when the defendant was convicted, and when fine and costs were assessed and collected out of which such State tax could and should have been paid.

There was a demurrer to the bill, and the only question presented by the record as it comes

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to this Court is the constitutionality of the Act of April 22, 1899, the object and purpose of which was to relieve against and release such taxes.

The Chancellor was of opinion that the Act was constitutional, and inasmuch as such holding had the effect to deprive the State of revenue to which it would have been entitled under a contrary holding, the State appealed.

In the Court of Chancery Appeals the Chancellor's decree was reversed, and the Act was held to be unconstitutional. The title of the Act is as follows:

"An Act to limit the time in which suits may be brought against any municipal corporation to recover the State or county privilege tax on litigation in cases tried before a Mayor or Recorder's Court, or any Police Court, of such corporation, and to authorize the dismissal of such suits now pending."

The Act itself is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That no suit shall be brought against any municipal corporation to recover the State or county privilege tax on litigation in cases tried before the Mayor's, Recorder's, or any Police Court of such corporation, prior to July 25, 1895, when such privilege tax has not been specifically taxed in the bill of costs, and a sufficient amount of money has not

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been paid to satisfy the fine and costs other than the privilege tax in such cases.

"SEC. 2. *Be it further enacted*, That it shall be the duty of any Court in which such suit is pending, when this statute is pleaded, and where the truth of the plea is made to appear to the satisfaction of the Court, to dismiss the cause, and this Act shall apply to any suit now pending, or hereafter to be brought; and that this Act shall take effect from and after its passage, the public welfare requiring it."

The Court of Chancery Appeals held, in substance:

That two subjects are stated in the caption or title, one being a limitation of time in which suits might be brought, and another the dismissal of suits then pending; that passing from the title to the body of the Act, Section 1 presents a third subject, to wit, a prohibition against bringing any new suit for such taxes; that in Section 2 the same duplex nature of subjects appears, to wit, the dismissal of suits then pending and the dismissal of suits thereafter to be brought.

The Court of Chancery Appeals was also of opinion the term "such suit," used in Section 2 of the Act, is ambiguous, and may refer to either of the classes of suits theretofore mentioned in the title and in Section 1 of the Act.

It is further said by that Court that the cases

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specified in the sections of the Act cannot be treated as subheads or subclasses covered by the general language of the title or caption.

We are of opinion the Court of Chancery Appeals is in error in its view of the Act, and that the Chancellor was correct.

We think that the title and body of the Act embraces only one general subject, which is expressed in the title, and the details and means by which the purpose is to be effected are left to the provisions of the Act, and that neither the title nor Act embraces distinct and incongruous subjects.

The Act is intended to cover a period of time from 1881 to July 25, 1895, when such litigation tax was in force, and to release and relinquish all claim of the State against such municipalities as had in the designated cases failed to assess and pay over to the State a tax imposed by statute in such cases, through the oversight or omission of the municipal authorities to assess such tax.

In furtherance of this general object the Act provides for the dismissal of suits then pending for such tax, and prohibits the bringing of any other suits for the same purpose. The term "such suits," as used in the Act, refers to any suits pending or to be brought for the general purpose indicated—to wit, the collection of such tax.

It is perhaps true that the Act, both in its

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title and body, might be framed more plainly, and the harmony between the two made more apparent, but the obvious purpose of the Act is that after its passage all suits of the character and for the purpose mentioned should be discontinued and dismissed, and no others should be instituted for the same purpose.

These provisions are not inconsistent. A statute with one general subject may embrace subdivisions, provisos, and exceptions pertinent to that subject, and so many of them as may be grouped without incongruity. *State v. Schlitz Brewing Co.*, 20 Pick., 720; *State v. Brown*, 19 Pick., 455; Story's Cons. Lim., side page 144; *State v. Yardly*, 11 Pick., 546; *Cannon v. Mathes*, 8 Heis., 519; *Garvin v. State*, 13 Lea, 166.

We think the case falls within the rule laid down in *State v. Yardly*, 11 Pick., 546, and *State v. Brewing Co.*, 20 Pick., 720, and that the reasoning and holding in those causes is applicable and controlling in this.

The decree of the Court of Chancery Appeals is reversed, and the bill dismissed.

Street Railway v. Gore.

STREET RAILWAY v. GORE.

(*Nashville*. January 15, 1901.)

VERDICT. *Joint, set aside as to part, and sustained as to other defendants.*

A joint verdict for damages against several defendants may be set aside, if found erroneous as to part of them, and sustained and enforced against the others, if found correct as to them.

Cases cited and approved: *Bentley v. Hurxthal*, 3 Head, 377; *Smith v. Foster*, 3 Cold., 147; *Webb v. State*, 4 Cold., 204; *Cox v. Crumley*, 5 Lea, 530.

Cited and overruled: *Draper v. State*, 1 Head, 262.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

R. F. JACKSON and J. M. ANDERSON for Street Railway.

WASHINGTON & ALLEN for Gore.

McALISTER, J. Plaintiff, as administrator of M. D. Gore, recovered a verdict for the sum of \$2,500 against the Nashville Railway and the Nashville Street Railway, jointly, for the negligent killing of plaintiff's intestate.

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A new trial was awarded the Nashville Railway, but the verdict was permitted to stand against the Nashville Street Railway. The latter appealed, and the only error assigned, in this Court, is that the verdict rendered by the jury, being a joint verdict against both defendants, and having been set aside by the Court as to the Nashville Railway, it could not stand as to the Nashville Street Railway; or, in other words, that the verdict of the jury was an entirety, and should have been set aside as a whole.

The evidence on the trial below fully established the special defense of the Nashville Railway, to the effect that at the date of the accident resulting in the death of plaintiff's intestate, that company did not own the road or operate the car inflicting the injury, but that said road was owned and managed by the Nashville Street Railway. Hence, the Circuit Judge set aside the verdict so far as it affected the Nashville Railway, but permitted it to stand against the other defendant.

Counsel cite Black on Judgments, Vol. 1, Sec. 211, in which the author says: "In general the authorities agree that the judgment cannot be affirmed as to one defendant and reversed as to another, but must be reversed as an entirety, and, conversely, if in favor of the defendants, invalidity as to one will invalidate it as to all. A judgment jointly entered in favor of several defend-

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ants, whether in an action upon contract or for tort, cannot be affirmed as to one and reversed as to another. Such a judgment is an entirety, and must stand or fall together." It is true this rule was recognized and applied by this Court in the case of *Draper v. State*, 1 Head, 262. It was said in that case that a judgment cannot be divided. If it is correct against one party, but erroneous as to others, it cannot be affirmed as to him and set aside as to the others; there must be a general reversal. But the Court refused to follow this rule in the case of *Bentley v. Hurxthal*, 3 Head, 377. "The rule," said the Court, "that a judgment is an entire thing, and therefore if void as to one party cannot be allowed to stand as to any of the other parties, is a purely technical one. A judgment may be correct in all respects as to one party and altogether erroneous or void as to another joint party, and in such case there is no sufficient reason why the party rightfully charged should be discharged merely on the ground that another party was wrongfully made liable by the same judgment." The last case was followed in *Smith v. Foster*, 3 Cold., 147; *Webb v. State*, 4 Cold., 204; *Cox v. Crumley*, 5 Lea, 530-535. This is now the well established practice, both in this Court and in the inferior Courts. It was the duty of the Circuit Judge to set aside the verdict as to the Nashville Railway, since there was

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no evidence to support it, nor can this action be made the basis of any complaint on the part of the Nashville Street Railway, which corporation was shown to be liable for the accident.

Affirmed.

State, *ex rel.*, v. Banks.

STATE, *ex rel.*, v. BANKS.

(*Nashville.* January 19, 1901.)

1. ELECTIONS. *Of school directors under Acts 1899, Ch. 218.*

Acts 1899, Ch. 218, properly construed, authorizes the election of school directors, as therein provided, in all school districts wherever situated that are not coextensive with the civil districts.

Act construed: Acts 1899, Ch. 218.

2. CONSTITUTIONAL LAW. *Subject of statute is expressed in title, when.*

And, thus construed, said Act is not amenable to the constitutional objection that its body embraces more than is expressed in its title.

Constitution construed: Art. II., Sec. 17.

Act construed: Acts 1899, Ch. 218.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. Cook, Ch.

J. A. CARTWRIGHT and J. H. ACKLEN for
Relator.

J. S. PILCHER for Banks.

WILKES, J. This suit involves the proper construction of Chapter 218 of the Acts of 1899.

State, *ex rel.*, v. Banks.

The rights of the relators to the office of School Directors of the Twenty-third Civil District of Davidson County depend upon this construction, and the constitutionality of the Act has also been brought in question, both in the Court below and in the Court of Chancery Appeals. The Act is in the words and figures following:

“AN ACT to provide for the election of School Directors in the various school districts in the State of Tennessee where the school districts are not coextensive with the civil districts.

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That it shall be the duty of the Commissioners or other officers of election in the various counties of this State, to open and hold elections in the various school districts in this State on the fourth Saturday in May, 1900, and biennially thereafter, for the purpose of electing three School Directors for each school district; *Provided,* That this Act shall not apply to any county in this State where school districts and civil districts are coextensive, or may hereafter be made so; *Provided,* That this Act shall not apply to incorporated towns which have a school system of their own; *Provided,* That this Act shall also include districts composed of portions of different counties.

“SEC. 2. *Be it further enacted,* That said election shall be held and governed by and under the laws now governing general elections, except that these elections shall be held at the school-

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houses in the various school districts, or such other places as said election officers shall direct, and that the polls shall be opened at 1 P.M. and shall be closed at 5 P.M., and that the officers holding said election shall not receive any compensation therefor.

"SEC. 3. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it."

The Chancellor held the Act to be constitutional, but his decree was reversed by the Court of Chancery Appeals, which pronounced the Act unconstitutional, and the relators have appealed to this Court and assigned errors.

The substance of the holding of the Court of Chancery Appeals is, that the Act is obnoxious to Section 17, Article 2, of the Constitution in that it embraces more than one subject, and that subject is not definitely expressed in the title; and also obnoxious to Section 5, Article 7, in that it provides for an election of civil officers at a different date from the first Thursday in August; that School Directors are civil officers in the sense of that section, and that their terms are fixed by that provision of the Constitution.

It appears that Cato, Burkhalter, and Cato, Jr., were elected School Directors for the Twenty-third School District of Davidson County on the fourth Saturday in May, 1900, and the effect of the holding of the Court of Chancery Appeals is that

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their election was void, and their contracts and acts as directors are illegal and void, and it is assigned as error that this holding of the Court of Chancery Appeals is erroneous.

Davidson County is divided into twenty-five civil districts and twenty-nine school districts; fourteen of the school districts are co-extensive with the civil districts, and ten of the remaining civil districts embrace the remaining fifteen school districts, and the school districts are so divided that they do not correspond with the civil districts; but the twenty-third civil district is co-extensive in territorial limits with the twenty-third school district. Banks, Walton, and Andrews claim to be the legal School Directors of the district, authorized to perform the duties of the same under an election held in August of a previous year. The Court of Chancery Appeals was of opinion that the title of the Act provides for the election of School Directors in the various (meaning all) school districts in the State when the school districts are not coextensive with the civil districts, and the body of the Act provides for opening and holding elections in all the school districts in the State on the fourth Saturday in May, 1900, and biennially thereafter with a provision which excepts counties where school and civil districts are coextensive, or may thereafter be made so.

The Court of Chancery Appeals was of opinion that this provision applies to counties alone where

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each civil district is a school district, and where all the school and civil districts are coextensive, and does not and cannot apply to any other. That Court says the Act, if valid, applies to all school districts, those coextensive and those not coextensive with civil districts, and hence the subject of the Act should be so construed as to apply to all school districts in the State not coextensive with the civil districts of the county, where said school districts are located, and not to apply to any school district in the State where such a school district is coextensive with the civil district of the county in which such school district is located.

The Court says this would lead to the anomalous and perplexing necessity of electing part of the school directors in May and part in August, a result which that Court says has led to great confusion, dissension, bickering, bitterness, strife, and litigation among and between school directors, teachers, pupils, and patrons of the public schools, to the great detriment of the school system and of the general public.

That Court further held that School Directors were civil officers within the meaning of Section 5, Article 7, of the Constitution, and the time for their election is, therefore, fixed by the Constitution for the first Thursday in August, and this time for election cannot be fixed for a different date by legislative enactment.

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We are of opinion the Court of Chancery Appeals has not properly construed the language of the Act in its application to school districts. It is true the Act is unhappily worded, and may bear the construction placed upon it by the Court of Chancery Appeals, but looking to its origin and purpose, as well as its language and the object intended to be accomplished and evils to be remedied by it, another construction can and should be adopted to carry out the purposes of the Legislature, and when this construction is placed upon the body of the Act, there is no want of harmony between the title and body of the Act, and there is no dealing with double subjects in either. The occasion for the Act, and the manner in which it was intended to apply, and the evil sought to be remedied, are plainly and tersely set out in an opinion given to the State Superintendent of Public Instruction on February 2, 1900, by the Attorney-general of the State, as follows:

“KNOXVILLE, February 2, 1900.

“*Hon. M. C. Fitzpatrick, Nashville, Tennessee:*

“DEAR SIR—Replying to your letter of recent date, requesting my opinion upon certain matters relating to the election of District School Directors. Prior to Chapter 218, Acts 1899, it seems that all elections of School Directors were had at the regular August election, and at the regular voting places in the several districts. This

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system operated satisfactorily in all cases where the school district was coextensive with the civil district, but was obviously very unsatisfactory where the school districts and the civil districts were not coextensive. In the latter case it usually happened at a regular election that the voters of a school district could not all attend and vote at the regular voting place. The civil district being composed of portions of two or more school districts, the voters were scattered, and much confusion prevailed as to the election of School Directors. To obviate this difficulty seems to have been the object of the Act of 1899. That Act leaves the former law in force, requiring the election of School Directors at a regular voting place, and at the regular election in August, in all cases where the school districts and civil districts are coextensive, and in all incorporated towns having a school system of their own. In this regard the law has not been changed by the Act of 1899, but under the Act of 1899, where the school district or school districts in any county are not coextensive with the civil districts, or where a school district includes parts of civil districts situated in different counties, the election for the District School Directors is required to be had on the fourth Saturday in May, 1900, and biennially thereafter. The Act fixes the place of holding the election in such cases not at the

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required polling places, but at the schoolhouses in the various districts, or at such other places as the election commissioners may select.

"I am of the opinion that the Act applies to any school district in any county which is not coextensive with the civil district, although there may be other school districts in that county which do correspond with the civil districts. School Directors elected under the Act of 1899 are required to enter upon their duties within thirty days of their election, just as those elected under former Acts are required to do.

"Yours very truly, .

"G. W. PICKLE, *Attorney-general.*"

It is stated that this construction of the Act has been conceded to be correct, and followed in all the counties and school districts in the State except in Davidson County. Whether this be true or not, we are satisfied it is the correct view and construction of the Act.

The only ambiguity that arises is in the use of the word "county" in the proviso, and the position in which it is placed, but we are convinced that the true meaning of the Act is as if it read: "Provided, That this Act shall not apply in any school district in any county of the State when the school district is coextensive with the civil district," etc. In other words, the Act deals with school districts as entities, and in-

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tended to leave school districts which were co-extensive with the civil district, as to the election of directors, as they were before the passage of the Act. That is, such election must be held in August, as heretofore, but in all school districts in any county of the State which have different limits from the civil districts, the election in such districts alone should be in May. This being the correct construction of the law, it is apparent the relators have no title to the offices claimed by them, and stand in no attitude to test the constitutionality of the Act, or to maintain this action for possession of these offices. In other words, the election for Directors of the Twenty-third Civil District of Davidson County should have been held in August, and not in May, inasmuch as the Twenty-third School and Civil District are coextensive, and the Act in controversy does not apply to that district. This disposes of the case and prevents our passing upon the question whether the Act is obnoxious to Section 5 of Article 7 of the Constitution, a result which we regret, inasmuch as it is important to the public and school interests that the question be decided. But our opinion upon that feature of the case would be a dictum, no matter how thoroughly considered it might be, as there are no parties before us who can properly raise the question.

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The bill must be dismissed at the costs of the relators. The Court being of opinion this controversy is not provided for by § 1427 (Shannon's compilation), providing for payment of costs out of the school funds of the district.

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BANK v. McADAMS.

(*Nashville.* February 2, 1901.)

CHANCERY PLEADING AND PRACTICE. *Burden of proof.*

Under a creditor's bill, seeking to reach his debtor's assets in the hands of a third person, and averring that such third person had received them subject to complainant's lien, or fraudulently, the burden is upon complainant. where the facts are put in issue by the answer, to prove the averments of his bill. Such third party is not in the situation of a garnishee or intervenor.

FROM MARSHALL.

Appeal from Chancery Court of Marshall County.
WALTER S. BEARDEN, Ch.

GEO. T. HUGHES and W. W. WALKER for
Bank.

MARSHALL & ARMSTRONG for McAdams.

BEARD, J. The complainant is a judgment creditor of the defendant, McAdams, with a return of *nulla bona* upon the execution issued from this judgment. The original bill was filed to reach certain promissory notes, alleged to be the property of the judgment debtor. He and the

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makers of these notes were made defendants to the bill. All the defendants answered. McAdams in his answer stated he was at one time the owner of the several notes described, but alleged that before the filing of the bill he had sold and transferred them to one Davis. In their answer his co-defendants admitted their liability in whole or in part as claimed by the complainant, but averred, on information, that Davis was claiming ownership by a transfer prior in time to the institution of this suit.

Thereupon complainant filed an amended bill in which it is alleged that "one Davis . . . is making claim to the said notes . . . which belong to said . . . McAdams, and were held by him at the time of the filing of the original bill." Complainant then averred "that if the said notes were transferred to the said . . . Davis by the said . . . McAdams, it was soon after the filing of complainant's bill; that the transfer was a device of the parties for the purpose of hindering, delaying, and defrauding complainant in the collection of its judgment."

McAdams and Davis answered this amended bill, and denied that the transfer was made after the filing of the original bill. They also denied that the transfer was a fraudulent device as charged by complainant, but on the contrary alleged that it was made in good faith and for value.

The Chancellor dismissed the bills of complain-

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ant, save in one particular not now in question, and the Court of Chancery Appeals has affirmed that decree.

The present appeal involves a question of chancery practice, arising upon the issue made by the bill as amended and the answer thereto. The Court of Chancery Appeals held that upon this issue the burden rested upon complainant to maintain the averments of its bill that go to impeach the title of Davis to the notes in controversy, and that the necessary result of its failure to carry this burden was a decree of dismissal, as already stated. It is now insisted that there was error in this holding.

It is conceded by complainant that the general rule is that where one comes into chancery he must make good by evidence the averments of his bill on which he seeks recovery, and that where he calls in question a transaction for fraud he cannot content himself with the suggestion that the defendant has failed to show *bona fides*, but he is bound to furnish satisfactory evidence of the fraud alleged. But it is contended it is otherwise in a case like the present; that complainant, having brought Davis in by process in the nature of garnishment proceeding, an issue is made between complainant, a garnisheeing creditor, and Davis, the claimant of the property sought to be reached, and as such claimant on this issue, the burden is on him to make good his title.

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In other words, to use the words of the brief of counsel for complainant, "Davis must recover on the strength of his title."

The argument of the counsel is that the attitude of Davis in the case is that of an intervenor or an interpleader, who comes to assert a prior and superior right to property levied upon by writs of attachment or execution, issued against another, in which case he is bound to establish his claim by affirmative testimony, and that such is the rule though he be brought in involuntarily by one who seeks to impeach his title.

This argument rests for authority on Sections 674, 675, 676 of Vol. 2 of Shinn on Attachment and Garnishment, and the cases cited in support of the text. But an examination of these sections makes it clear that the author is dealing with the statutory practice of intervention or interpleading of a claimant of property seized by attachment or execution, and not with a rule of equity practice. The cases relied upon in support of the text, where pertinent at all, arise under statutory or Code provisions. Each of these cases involves a question of practice under such provisions. All announce that when a claimant comes in by interplea or intervention, setting up title to such property, the sole issue between him and the execution or attachment creditor is the superiority of the former's claim; that the burden of proof is on him, and he must recover on the

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strength of his title. No one lays down a rule of general equity practice and they furnish no authority for the contention in the present case.

This amended bill is the ordinary bill of a creditor who seeks to subject property of his debtor, which it is averred the latter and a third party are covinously undertaking to withdraw from the satisfaction of a just claim. It alleges, in substance, that the property was not transferred when the original bill was filed, or, if so, it was done fraudulently, and that in either contingency the complainant has the right to reach and appropriate it. Both these averments are denied by the answer. These denials, under the rule of chancery practice already mentioned, put the complainant to the proof. The defendants could await evidence on the issues thus made; the complainant could not. The burden was on the latter, though it involved the necessity of furnishing proof of the negative contained in the first of its alternative allegations. 1 King's Dig., p. 410. Having failed to do this, his suit necessarily failed.

As to the facts developed in evidence, we are concluded by the finding of the Court of Chancery Appeals. This is equally true as to the inferences of fact made by that Court from the facts found. We might agree with the complainant's counsel as to the evidential effect of the possession and claim of ownership of the notes

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in controversy by McAdams just prior to the filing of the original bill, and his conceded fraudulent purpose in disposing of these notes, coupled with the fact that the alleged fraudulent transferee has failed to testify. But this would be to no useful end. The finding of the Court that there is "no evidence in the record to connect Davis with McAdams' fraud," is conclusive of the case.

The decree of that Court is therefore affirmed.

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WATTERSON v. NASHVILLE.

(Nashville. February 2, 1901.)

1. MUNICIPAL CORPORATIONS. *Not liable on implied contract, when.*

Where the charter of a municipal corporation provides that alterations and modifications in the original plans and specifications of public works or buildings shall not be made in the course of their erection, except upon order of its Board of Public Works, and that such order shall be of no effect until the price to be paid for the changes and modifications shall have been agreed upon, in writing, signed by the contractor and approved by the Board, the cost of the whole, including the extra work, in no case to exceed the original estimate, the city cannot, under such charter, be held by the contractor as upon an implied promise, even when the building or work has been completed and accepted, for the cost of changes or modifications made in the plans and specifications thereof in disregard of said requirements. (*Post*, pp. 411-414.)

2. SAME. *Same. Declaration.*

And a declaration, in an action by the contractor, seeking to recover from the city the cost of such changes and modifications, is fatally defective and bad on demurrer, which fails to aver affirmatively that same were made in conformity to the said charter requirements. (*Post*, pp. 411-414.)

3. CONTRACTS. *Illegal, when.*

Express contracts made in violation of the prohibition of statute ordinance are void. *A fortiori* an obligation will not be implied from a transaction done in violation of the prohibition of statute or ordinance. (*Post*, pp. 414, 415.)

Cases cited: *Stephenson v. Ewing*, 87 Tenn., 46; *Cary Lombard Lumber Co. v. Thomas*, 92 Tenn., 589.

4. SAME. *Same. Ratification.*

And such contract for changes and modifications in the plans and specifications of public works or buildings, in violation

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of the prohibitions of an ordinance, are not susceptible of ratification by the corporation. (*Post*, pp. 416-424.)

Cases cited: *Memphis v. Gas Co.*, 9 Heis., 531; *Land Co. v. Jellico*, 103 Tenn., 320; *Gaslight Co. v. Memphis*, 93 Tenn., 612.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

BARTHELE & KEEBLE for Watterson.

PRICE & McCONNICO for Nashville.

BEARD, J. This case is one of implied assumpsit, coming by appeal in the nature of a writ of error, from the judgment of the Circuit Court sustaining a demurrer to plaintiff's declaration. The averments of the declaration, in substance, are that plaintiff in error had made a written contract with the defendant, through the Board of Public Works and Affairs, its duly authorized agent, to do the carpenter work on the new City Hall, and that while doing this work according to plans and specifications, made a part of his contract, he was ordered to make certain changes and modifications not included in the original plans and contract, which involved the use of more costly material and much increased expense to plaintiff in error; that on receiving this order he gave

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written notice to the Board of Public Works and Affairs that he would demand extra compensation for this extra work, and that thereupon he proceeded to do the work, upon the assurance of the Board, through its president, that it would be paid for "when the contract was completed." It is also averred that though ordering these changes and modifications, and upon the completion of the work, accepting and still retaining the benefits of it, the defendant declined to pay therefor, to the damage of plaintiff twenty-five hundred dollars.

The ground of the demurrer held fatal to the declaration was that it failed to aver a compliance with certain statutory or charter requirements essential to a valid contract for extra work, lacking which, it was insisted that in the face of the prohibitions of the statute or charter, this action of implied assumpsit could not be maintained.

The charter provisions relied upon by the demurrant, and which by the trial Judge were held sufficient to defeat plaintiff's action, are as follows:

"Section 43. When, in the opinion of the Board it shall become necessary in the prosecution of any work to make alterations or modifications in the specifications or plans of a contract, such alterations or modification shall only be made by order of the Board, and such order shall be of no effect until the price to be paid for the same shall have been agreed upon in writing and

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signed by the contractor and approved by the Board. The total cost of the work, with the addition of the price agreed upon, shall not exceed the original estimate.

“Sec. 44. No contractor shall be allowed anything for extra work caused by an alteration or modification, unless an order is made or an agreement signed, as provided in the preceding section, nor shall he in any case be allowed more for such alteration than the price fixed by the agreement.”

It will be seen that the constituent elements alleged by the demurrer to be vital to a contract for alterations and modifications in some work in progress, and which the declaration in the case fails to aver existed in plaintiff's contract, are that the price to be paid for such extra work must be agreed upon in writing and signed by the contractor and approved by the Board, and that the total cost of the work, including that of the extra work, shall not exceed the original estimate. Wanting these elements it is insisted by the demurrant that the contract is void, and the city is expressly prohibited from allowing the contractor anything for the extra work done under it.

We think there can be no doubt that these statutory elements are essential to the making of a lawful contract for extra work, and that lacking in them, the contract is void; and that in

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the face of the inhibitory terms of the charter provisions no action can be maintained in any form to recover from the city the value of such work.

We have had occasion several times to consider questions cognate to the one involved in this case, and it has been distinctly held that contracts made in violation of a prohibitory statute cannot be enforced. Among the cases so holding are *Stephenson v. Ewing*, 87 Tenn., 46, and *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 589. The first of these was an action brought by an unlicensed real estate broker to recover commissions for negotiating a sale of real estate. The statute then in force declared the occupation of a real estate broker to be a taxable privilege, and provided that it should "not be pursued without license." The statute was successfully interposed as a defense. This Court said: "Here is an express prohibition of all unlicensed persons to act as real estate brokers, and consequently, a prohibition by necessary inference of all contracts which such persons shall make for compensation to themselves for so acting. It is familiar law, both in England and America, that a contract prohibited, either expressly or impliedly, by statute is illegal, and cannot be enforced." To this proposition many authorities are cited.

The case of *Cary-Lombard Lumber Co. v. Thomas*, *supra*, was that of a foreign corporation deal-

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ing through an agent located in Memphis and supplying lumber for the construction of a house in that city, seeking relief to the extent of the value of the material so furnished. This corporation had failed to comply with the requirements of Ch. 122 of the Acts of 1891, until after a considerable part of this lumber had been supplied. As to that portion of the account which accrued after the Act took effect and prior to the registration of its charter, the Court said: "All contracts made and all business transacted by it in Shelby County between these dates were illegal, and no rights of property or of action could arise out of the same. It follows that such company can have no remedy growing out of any transaction between these dates in Shelby County, and can recover upon no contract, express or implied, entered into between these dates, and is not entitled to retake or recover any material or lumber furnished within these dates."

This last case would seem to be as conclusive against the right to recover on an implied assumpsit resting upon the acceptance and appropriation of the fruits of a prohibited contract, as upon the express contract under which these fruits or benefits were conferred, because the case showed that at the time this Court was repelling the complainant corporation, the defendants, Thomas and wife, were in the enjoyment of the property, into which its material had been worked.

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But it is said we are precluded from applying this principle to the present case, because of utterances made and conclusions announced in other and later cases determined by the Court. We will briefly examine these cases.

In *Gaslight Co. v. Memphis*, 93 Tenn., 612, the claim was for a balance due complainant on an account for illuminating gas furnished the city for the years from 1879 to 1884, inclusive. There were written contracts covering the years 1879 and 1880 and 1881; if there were contracts in writing for the years 1882, 1883 and 1884 they were not found, yet it did appear that the gas was furnished for these years according to bids and upon the same terms as in the former years. By the terms of the written contracts the city was to pay the company for the gas consumed from a fund to be derived from a tax levy of ten cents on each one hundred dollars worth of property within the city, and the gas company was to look alone to this fund for compensation. This tax levy was made each of the several years, realizing an amount sufficient to discharge the claim of the company. The fund being otherwise appropriated, suit was brought on balance claimed to be due. The city ineffectually interposed the statute of limitations against so much of this claim as was more than six years old, the Court holding that the fund so collected was impressed with an express trust against which the statute did not

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run. In addition the city insisted that, in no event could the company recover for the gas consumed in these years for which no written contracts were produced. This defense was made in regard to a clause of its charter which provided that all its contracts should be in writing and signed by the commissioners consenting thereto and recorded in a well bound book open at all times for public inspection. This defense was also overruled, and it was held that having used the gas the city was liable upon a *quantum meruit*.

We adhere to the principle upon which this holding was made, but we are unable to discover in it any support for the contention of the plaintiff in error in the present case. To contract for gas was within the scope of the power of the city, and the charter provided certain formalities in the making of that contract, which it was the duty of its agents to observe. While this duty was imposed, "the statute does not necessarily imply that a failure in conformity would vitiate the contract, and especially does it lack all intimation that such nonconformity on the part of these agents should deprive the contractor of all right of recovery for his work, time or material furnished under such contract and afterwards accepted by the city. In such case nonobservance of the statutory requirements might well be taken as a mere irregularity, so that when the city levied

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and collected taxes to discharge the contract, and also accepted the benefits of it, the other party to the contract might well invoke the general law, which imposes the obligation "to do justice," and "which binds all persons, whether natural or artificial."

Land Co. v. Jellico, 103 Tenn., 320, was a suit to recover for moneys expended in improving a street in the town of Jellico, under a contract authorized at a special meeting of a municipal board, and the defense was that this meeting was held in the absence of one or two of its number, occasioned by the lack of notice to them that it would be held. The Court recognized the general rule that notice to each member of such meeting was essential to the validity of an act done at it, yet, inasmuch as the town had the right to improve its streets, and also to make a contract for its improvement, and was enjoying the benefits of the work done under this contract, it was held liable upon the ground of an implied contract.

Thus it will be seen that these cases, while applying the rule of an implied promise from advantages received, and thus giving relief when the innocent party could not have obtained it upon the express contract invalid for irregularity, give no color to the contention that this rule can be availed of in a contract expressly prohibited by the statute.

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But it is insisted that this contention is sustained by the great weight of authority outside of this State. The most of the cases cited by the counsel are to the proposition that where a municipal contract has been made, lacking in some technical or formal regularity not jurisdictional in character, under which the other party has in good faith done work or furnished material, the benefit of which has been appropriated by the municipality, justice will be done by raising an implied assumpsit in favor of the party doing the work or furnishing the material. Four cases are pressed upon us, as holding that such relief may be given even when the contract is prohibited by statute. We will now briefly consider these cases.

In *Argenti v. City of San Francisco*, 16 Cal., 258, a recovery was sought for work done on certain streets of San Francisco. The opinion of the Court was delivered by Cope, J., and concurred in by Fields, J., the third member of the Court, Baldwin, J., apparently not participating in the disposition of the case. One of the defenses was that the city charter forbade the creation of any indebtedness which, with all former debts, should exceed in the aggregate the sum of \$50,000 over and above the annual revenue of the city, and that in violation of this charter provision the contract under which the work was done was made. The Court held the

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provision to be directory, because of the indefiniteness of the standard furnished by the statute, but further, if in error in this, then that the city having received the work contracted for, would not be permitted to enjoy it without paying for it, citing many authorities in support of this last proposition. In answer to a petition to rehear the cause, Field, J., delivered an opinion in which, after adhering to the judgment reached by the Court theretofore, withdrew his assent to the doctrine of an assumpsit implied from mere use and placed his adherence upon the ground that the contracts made were valid and enforceable. Judge Fields said: "I place my concurrence in the judgment heretofore rendered . . . upon the validity of the contracts with the city. . . . I have been thus explicit because I do not consider that, independent of such contracts, any liability would attach to the city for the improvement of the streets. A municipal corporation can only act in the case and in the mode provided by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts has no application to cases of this character."

Nelson v. Mayor, 63 N. Y., 535, was an action brought to recover a large balance due on a contract to furnish "sewer drain pipes," etc.

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A motion for a nonsuit was entertained upon two grounds—one being that the plaintiff had failed to show that an appropriation had been previously made, covering the expenses contemplated by the contract. By the charter of New York it was provided “that no expense should be incurred by any of the departments . . . unless an appropriation should have been made covering such expense.” In meeting a particular argument of the plaintiff below resting upon another clause in the statute bearing on the subject of controversy, the Court said: “The difficulty in the way of this argument is, that if when the contract was made there was no previous appropriation covering the expense, it fell within the prohibition and was illegal and void. . . . It does not follow, however, that though the contract be void the plaintiff would be entirely without remedy. If, as is alleged, the city has obtained his property without authority, but . . . received the avails of it, it would seem that, independently of the express contract, an implied obligation would arise to make compensation.” This, however, was obiter, for the case was at last rested by the Court upon a later Act, the necessary effect of which, it was held, was to legitimate this contract. The Court said: “The city admits that it has received and used the material furnished by him (the plaintiff). The Legislature has provided the means of payment, and by so

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doing has taken the case out of the general provision requiring a previous appropriation, and unless some substantial defense can be shown to the claim, we see no reason why it should not be paid, in accordance with the intention of the Legislature." So on this ground alone was the case reversed and sent back for a new trial.

The case of *Silsby Mfg. Co. v. Allentown*, 153 Penn. State, 320, announced the proposition, about which there can be no controversy, that councils of a municipality may adopt an act done for the benefit of the city by one of the municipal officers and assume the debt so contracted when the only objection to it was the officer was without authority at the time of entering into the contract.

These cases, when analyzed, we think, fail as authority for the contention of plaintiff in error. But it may, and possibly must, be conceded that the case of *City of Cincinnati v. Cameron*, 33 Ohio St., 336, does support it. The opinion of the Court delivered in that case indicates much research and presents the issue insisted on here, with much ability. But as against it are the holdings of many courts of the highest respectability. In *Murphy v. Louisville*, 9 Bush, 191, the Court said: "If the alleged contract is made otherwise than as required by ordinance, it is not binding, and if not obligatory as a contract, the law creates no implied promise to pay." In *McDonald v.*

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New York, 68 N. Y., 25, the Court, speaking through Folger, J., said: "How can it be said that a municipality is liable upon an implied provision when the very statute which contains its corporate life and gives it its powers prescribes the mode of exercising them, and says that it shall not and hence cannot become liable save by express promise. Can a promise be implied which the statute of frauds says must be in writing to be valid? How do the cases differ?"

And in *Zottman v. San Francisco*, 20 Cal., 96, the Court, repudiating the doctrine of liability by implication, announced by Cope, J., in *Argenti v. San Francisco*, *supra*, said, through Field, J.: "The law never implies an agreement against its own restrictions and prohibitions," or as it is expressed in the New York case (*Brady v. The Mayor and City*, 16 Hun Pr., 432): "The law never implies an obligation to do that which it forbids the party to agree to do." See, also, *Stewart v. Cambridge*, 125 Mass., 102; *Boston Electric Co. v. City of Cambridge*, 163 Mass., 64; *Dickinson v. City of Poughkeepsie*, 75 N. Y., 65; *McBrien v. City of Grand Rapids*, 56 Mich., 95; *Schum v. Seymour*, 24 N. J. Eq.; *Addis v. City of Pittsburg*, 85 Penn. St., 379; Beach on Pub. Corporations, 252; 1 Dillon on Municipal Corp., Sec. 461; Tiedeman on Municipal Corp., Sec. 164.

We are satisfied the rule thus announced is

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sound; that statutory requirements such as are found in the charter provisions in question are jurisdictional in character, a compliance with which is essential to the integrity of a contract for extra work, and that a contract made in disregard of them is void beyond the power of subsequent ratification. To use the language of Chief Justice Nicholson in the *City of Memphis v. Memphis Guyoso Gas Co.*, 9 Heis., 531, "it may be laid down that when a corporation or an agent thereof does an act or makes a promise that is forbidden by its charter or is not authorized thereby, either expressly or by fair implication, the act or promise is a nullity and cannot be binding by a subsequent ratification."

The application of this rule will work hardship in particular cases, but this is better than that wise safeguards contrived by the Legislature to protect the public against improvidence and fraud should be broken down by the Courts. It is not requiring too much that parties dealing with municipal agents should inform themselves of the extent of their authority, as well as of the essentials of a valid contract. In other cases *ignorantia juris neminem excusat*, and there is no reason why it should be otherwise when a party enters into dealings with a public corporation.

The judgment of the lower Court is affirmed.

Haynes v. Bank.

HAYNES v. BANK.

(Nashville. February 9, 1901.)

1. INJUNCTION. *Judgment on bond upon dissolution.*

Upon dismissal on demurrer of an injunction bill restraining the prosecution of an action at law for collection of notes, the defendant is entitled to decree against complainant for the amount due on the notes and costs, and against the sureties on his injunction bond for interest and costs only. (*Post*, pp. 426, 427.)

Case cited: *Horton v. Cope*, 6 Lea, 155.

2 SAME. *Practice upon injunction of action at law.*

It is the better practice for Courts of Equity to require parties to confess judgments in actions at law before granting, or as a condition of granting, injunction to stay proceedings therein. But, even if confession of judgment at law is not exacted upon granting an injunction in such case, a Court of Equity will, nevertheless, upon dismissal of the bill and dissolution of the injunction, proceed ordinarily to dispose of the matters involved, and refuse to permit any renewal of the litigation in the law Court. (*Post*, pp. 427-429.)

Cases cited: *Chadwell v. Jordan*, 2 Tenn. Chy., 635; *Perkins v. Woodfolk*, 8 Bax., 414.

FROM WILSON.

Appeal from Chancery Court of Wilson County.
WALTER S. BEARDEN, Ch.

CANTRELL & McMILLAN for Haynes.

TARVER & GOLLADAY for Bank.

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McALISTER, J. Complainants, Jno. A. and Jno. C. Haynes filed this bill to restrain the Second National Bank of Lebanon from the prosecution of a suit before a Justice of the Peace for the collection of two notes, alleging usury in the discount of said notes, and alleging further that large amounts of usury had been charged complainants by said bank in other transactions, and seeking to set off said usury against the notes in suit. An amended and supplemental bill was filed, but it is not necessary now to state its allegations. A demurrer was then interposed by the defendant to both the original and amended bills, assigning for cause:

1. That the usurious transactions alleged were barred by the statute of limitations of two years.

2. That the measure of damages prescribed by Congress for knowingly collecting usurious interest is double the excess over the legal rate of interest, to be collected in an action to recover the penalty, and that said penalty cannot be interposed as a defense or set-off against an action brought by the bank for the collection of the notes.

The Chancellor, upon argument, sustained the demurrer and dismissed the bill. But the Court, on motion of the defendant bank, pronounced a judgment against the complainant on said notes upon the ground that complainants' bill enjoined the bank against the prosecution of the suit on

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said notes before the Justice of the Peace. On appeal the Court of Chancery Appeals affirmed the decree of the Chancellor in dismissing the bill, but reversed his action in pronouncing judgment on the notes. The Second National Bank alone appealed, and has assigned as error the decree of the Court of Chancery Appeals in refusing it a judgment on the notes. This assignment of error is well taken. When complainants' bill was dismissed by the Chancellor, on the hearing of the demurrer, the bank was entitled to a judgment on the injunction bond against the complainants for the principal of the debt, interest and costs and against the sureties thereon for interest and costs. *Horton v. Cope*, 6 Lea, 155. There was a breach of the bond the moment the injunction was dissolved and the bill dismissed.

It is insisted, however, that the Chancellor who ordered the injunction should in his fiat have required a confession of judgment at law, and, since there was no such requirement, complainants are now entitled to reopen their defense at law. It would have been in accord with the established practice for the Chancellor to have required a confession of judgment as a condition of granting the injunction. *Chadwell v. Jordan*, 2 Tenn. Ch., 635; *Perkins v. Woodfolk*, 8 Bax., 414-417.

Says Mr. Gibson, viz.: "A Court of Equity should not ordinarily grant an injunction to stay proceedings at law before judgment unless the

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party applying for the injunction will confess judgment in the suit at law, such judgment to be dealt with as the Court granting the injunction may order. It is inequitable to allow the defendant at law to litigate the same matter in both Courts, and unless he is required to close the legal contest, by confessing judgment in the suit at law, he may, after a long litigation in chancery, dismiss his bill and then renew his defense in the Court of Law." Suits in Chancery, Sec. 796, note 4.

This injustice is illustrated in the present case. The injunction herein was issued November 17, 1896, and during the intervening years the bank has been restrained from prosecuting its action at law. The injunction is now dissolved, and the insistence of complainant is that because a confession of judgment was not required in the fiat of the Chancellor ordering the injunction, the bank must be remitted to the prosecution of its original action at law. This contention is not sound.

There was nothing to be litigated at law. The only defense sought to be interposed to the notes was in the nature of a set-off for usury charged in that and other transactions with the bank. The Chancellor held on the demurrer that the claim of usury could not be set off, but must be litigated in a suit to recover the penalty, as prescribed by the Act of Congress. Moreover, the

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Chancellor held that the claim for usury was barred by the statute of limitations. These questions were adjudicated by the Chancellor on the demurrer, and his holdings affirmed by the Court of Chancery Appeals. The complainant has not appealed from those rulings. It is obvious that these questions cannot be reopened in the suit at law, and since no other question was made in complainants' bill against the notes, we are unable to perceive any reason for renewing the litigation.

The decree of the Court of Chancery Appeals is reversed, and judgment will be entered here against complainants on the injunction bond for the amount of the notes, interest and cost.

State v. Hoskins.

STATE v. HOSKINS.

(Nashville. February 9, 1901.)

1. ABATEMENT. *Plea in abandonment of.*

A plea in abatement upon which no action was invoked in the lower Court must be treated by this Court as having been abandoned.

2. CONSTITUTIONAL LAW. *Act of 1897, Ch. 114, relating to landlords' and furnishers' liens, valid.*

A statute does not authorize imprisonment for debt in violation of the Constitution, which makes it a misdemeanor, and punishable as such, to dispose of property, or its proceeds, which is subject to a landlord's or furnisher's lien, with the purpose of defeating the collection of the debts secured by such lien.

Act construed: Acts 1897, Ch. 114.

3. SAME. *Same.*

A statute does not embrace two subjects in violation of the constitutional provision, but only two subdivisions of one general subject, which forbids, under the penalties of a misdemeanor, disposition of property subject to landlord's or furnisher's liens with intent to defeat the collection of the indebtedness secured by such liens.

Constitution construed; Art. II., Sec. 17.

Act construed: Acts 1897, Ch. 114.

FROM RUTHERFORD.

Appeal in error from the Circuit Court of
Rutherford County. FOUNT SMITHSON, Sp. J.

State v. Hoskins.

Attorney-general PICKLE for State.

WHITTAKER & LYTTLE for Hoskins.

WILKES, J. The defendant was indicted in the Circuit Court of Rutherford county. There are two counts in the indictment, one for selling and disposing of corn upon which there was a landlord's lien for rent, and the other count charging that it was a furnisher's lien. Both counts charged that the sale was made for the purpose of depriving the owner of the debt, of the crop and its proceeds. The indictment is predicated upon the Act of 1897, Chapter 114.

There was a motion to quash, which was overruled. There was also a plea in abatement, which does not appear to have been acted upon, and must, therefore, be treated as abandoned.

There was a plea of not guilty, and a general verdict. The judgment of the Court is that for the offense of selling the corn which was under lien, not specifying whether landlord or furnisher's, the defendant be fined \$25. There was a motion for new trial and in arrest of judgment, and defendant appealed. It is said the Act of 1897, Chapter 114, is unconstitutional because it authorizes imprisonment for debt. This we think is not well taken. The imprisonment authorized by the Act is for failing to pay the fine imposed for a violation of the law, and unlawfully selling the crop, and is no more im-

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prisonment for debt than any imprisonment authorized for failure to pay a fine imposed for the commission of any other misdemeanor.

It is said in the next place that it is unconstitutional because in contravention of Section 17, Article 11, which provides that no bill shall become a law which embraces more than one subject, to be expressed in the title. The contention is that the Act embraces two distinct and separate subjects, landlord's liens and furnisher's liens. We think this criticism not well made. The general subject of the Act is the sale and disposition of crops upon which there are liens, either of landlords or furnishers, with the purpose of depriving the owner of the indebtedness for which the lien exists on the same or its proceeds, and to punish the same. There are not two subjects, but two subdivisions of the same general subject.

Quite a number of errors are assigned. It is not necessary that we should notice them. We are not satisfied with the conviction. We are of opinion that the landlord waived his lien upon this crop, sold by the defendants, and that he either expressly agreed that the tenant might sell the same, and use the proceeds, or led him to believe that in view of the personal security he had taken for the rent, the lien was not a matter of any concern or importance to him and was waived.

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This being so there is an absence of criminal intent on the part of the defendant in selling the crop and using and consuming a part of the proceeds.

We therefore reverse the judgment of the Court below and remand the cause for a new trial.

Rodes v. Boyers.

RODES v. BOYERS.

(*Nashville*. February 16, 1901.)

ADMINISTRATION. *Priority of.*

Letters of administration granted to a creditor of the estate, or even to a stranger, five years after an intestate's death, will not be revoked on application of the widow or next of kin claiming priority of right to administer, in the absence of some satisfactory explanation of their delay in asking for letters of administration.

Code construed: § 3939 (S.); § 3047 (M. & V.); § 2206a (T. & S.).

Cases cited: *Wilson v. Hoss*, 3 Hum., 142; *Varnell v. Loague*, 9 Lea, 161.

FROM SUMNER.

Appeal in error from the Circuit Court of Sumner County. LYTTON TAYLOR, Sp. J.

C. E. RODES and J. J. TURNER for Rodes.

J. W. BLACKMORE, DISMUKES & DISMUKES for Boyers.

WILKES, J. This is a contest over the right of priority to administer upon an estate. Thomas Boyers, Jr., died intestate in April, 1895, leaving a widow, son, and daughter.

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He was indebted at the time of his death to J. J. Turner by judgment for \$1,478.25, and this seems to have been his only debt. He left but little estate. No year's allowance, homestead or dower, was assigned, and no administrator was appointed until January, 1900, when C. E. Rodes was, at the instance of J. J. Turner, the creditor, appointed and qualified. Thereupon the son, daughter and her husband filed a petition in the County Court to remove Rodes and to have the son, Thomas Boyers, junior, appointed in his stead, the widow having died in the meantime. The petition stated that there was but little personal estate, and that the administration had been imprudently granted and illegally issued to Rodes; and that while Turner was a creditor Rodes was not. Thereupon J. J. Turner made application and was joined with Rodes and gave bond and took out letters. Upon hearing in the County Court the letters granted to Rodes and Turner were revoked and canceled, and Thomas Boyers, Jr., was appointed in their stead. Rodes and Turner appealed to the Circuit Court. In the meantime Turner had filed a bill in Chancery to sell certain lots belonging to the estate for satisfaction of his debts. On hearing in the Circuit Court the action of the County Court was affirmed, and Rodes and Turner have appealed to this Court and assigned error.

The only question before us is, Should the County

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Court have revoked the letters granted to Rodes and Turner and appointed Boyers in their place? The statute (Shannon, § 3939) provides that administration shall be granted to the widow in the first instance if she applies, second to the next of kin, and third to the largest creditor.

Neither the widow nor next of kin made any application to administer for about five years after the death of the intestate, and no excuse or reason is given for the delay. In the case of *Wilson v. Hoss*, 3 Hum., 142, Hoss, who was neither a creditor nor next of kin, was appointed administrator, and the Court held that his appointment was *prima facie* evidence of the right to administer, and the letters should not be revoked or recalled without evidence that he was not entitled, and that another was so entitled.

It was held in the case of *Varnell v. Loague*, 9 Lea, 161, that the next of kin had the right, as against a public administrator, to administer within six months from the death of intestate, but if letters were granted to the public administrator within the six months, they would not be void, but might be revoked at the instance of the next of kin within the six months. In Pritchard on Wills, Sec. 545, it is said: "The statute does not expressly limit the time which shall be allowed persons entitled to preference in granting an administration to assert such preference by making application, but other statutes pro-

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vide for committing administration to a public administrator, and for the appointment of an administrator in chancery after six months from the death of an intestate; thus in effect limiting the time within which a superior right to administer shall be asserted to six months as against an appointment made after that time, unless the delay is satisfactorily accounted for.

Without fixing six months as an invariable rule, we think that it is a safe and reasonable one. In any event the right of priority cannot continue indefinitely and without limit, and we think it is waived by failure to assert it within five years, as in this case, without giving some good reason for the delay. We are therefore of opinion there is error in the action of the County and Circuit Courts in holding the appointment of Boyers to be good, and in removing Rodes and Turner as administrators, and the judgment of said Courts is reversed, and the letters of Boyers are canceled, and the right of Rodes and Turner to continue in the administration is declared.

The petitioners will pay the cost of the proceeding.

Railroad v. Jackson.

RAILROAD v. JACKSON.

*(Nashville. February 16, 1901.)*1. MASTER AND SERVANT. *Fellow-servants.*

The conductor of a freight train, accustomed and required to assist, as brakeman, in making up trains at stations, is not a fellow-servant of the depot agent, through whom the company's orders are transmitted to the conductor, and whose duty it is to keep the switch yard in safe condition, in such sense as to prevent the conductor's recovery against the company for the negligence of the depot agent in permitting a dangerous obstruction, to wit: a pinch bar, to remain upon the switch yard, whereby the conductor, while coupling and uncoupling cars, was thrown down and crushed by the train. (*Post*, pp. 439-445.)

Cases cited: *Railroad v. Rush*, 15 Lea, 145; *Railroad v. Handman*, 13 Lea, 423; *Railroad v. Gurley*, 12 Lea, 46; *Railroad v. D'Armond*, 86 Tenn., 73; *Railroad v. Wheless*, 10 Lea, 741.

2. NEGLIGENCE. *What is.*

It is negligence for a depot agent, having charge of a switch yard and required to keep it in safe condition, to fail to inspect the yard after it has been used by shippers in loading cars, before the arrival of trains. (*Post*, pp. 446-449.)

FROM DICKSON.

Appeal in error from Circuit Court of Dickson County. A. H. MUNFORD, J.

Railroad v. Jackson.

LEECH & SAVAGE for Railroad.

H. LEECH, J. LEECH, H. J. BOWERS, and
FRANK SLEMMONS for Jackson.

WILKES, J. This is an action for damages for personal injuries. There was a trial before the Court and jury, and a verdict and judgment for \$1,999.99, and the railroad has appealed and assigned errors.

The case as presented by the plaintiff in his declaration, is that he was a conductor of a freight train on the road of the defendant company, and that on reaching Slayden Station it became necessary to take into the train a car at that station. Not having a full crew of train hands, because of the desire of the company to operate the road as economically as possible, it was necessary for him to sometimes do the work of a brakeman. On this occasion he had only two brakemen, and while he was coupling and uncoupling some cars, and when he was between them for this purpose, he stepped on a pinch bar or round piece of iron that had been negligently left on the track between the rails. This caused his foot to turn, and threw him between the moving cars, which ran over his foot and crushed it so as to require its amputation. This pinch bar was used to move cars on the side track at the station when there was no engine there for the purpose.

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The allegation was that it was the duty of the station agent to keep the tracks clear on the station grounds, and that he failed to perform this duty, but negligently left the bar where it caused the accident.

The contention is that this plaintiff and the station agent were not fellow servants, but were engaged in distinct and separate departments. It appeared from the proof that the conductor was required to do not only the duties appertaining to his place, but also some of those which are ordinarily done by brakemen, and this because of a scarcity of train hands.

One of the rules of the company was that station agents should have charge of and be responsible for the company's books, papers, buildings, sidings, and grounds at their respective stations, and should be responsible for the property intrusted by the company in the transaction of its business to him, and should inspect the station, buildings, and grounds daily, and see that they are in proper condition for the accommodation of passengers and the reception of freight, etc. This rule, the plaintiff insists, put upon the agent at that station the duty to see that this iron bar, which was used to move cars on the tracks in the depot yard in the absence of an engine, was kept off the tracks when not in use, and the nonperformance of that duty was negligence upon his part, which having caused the

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plaintiff's injury, the master (in this case the defendant company) is liable.

The basic idea of the plaintiff's pleading, and which was accepted by the Court, as manifested in its charge and refusals to charge, was, that the plaintiff and the station agent were not "fellow servants, but were in distinct, separate, and different departments of service, had no association in their employment; plaintiff having no relation to or connection with said agent save to go to the station and take therefrom such cars as he might order, and to do such switching or moving of cars in the yard as he might order done."

The Court charged the jury as follows:

"The rule that an employee cannot recover for injuries caused by the negligence of a fellow-servant applies where the parties are engaged in one common work in the same department of employment, but where the employment is for separate and distinct purposes, although employed by the same person or railroad company, they would not, in the contemplation of law, be fellow-servants. As an illustration: If one person is employed to operate and run a train of cars, and the other to look after the company's property at a station, keep the yards and tracks clear of obstructions, and receive and forward freight, these positions would not be the same character and class of responsibilities as would render them

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fellow-servants to that extent that the one assumes the ordinary risk of the negligence of the other," and declined to charge several requests which in different form presented the theory that the plaintiff and station agent should be treated as fellow-servants, so that the master would not be liable to either for the negligence of the other, and this presents the only real matter of controversy in this case.

We are cited to quite a number of cases from the United States which can be of little service to us in this case, as the decisions of these Courts are not in accord with our own upon the general doctrine of fellow-servants and employees in different departments. Such are the cases of *Railroad Co. v. Peterson*, 162 U. S., 346; *Railroad Co. v. Conroy*, 175 U. S., 323; *Randall v. Railroad Co.*, 109 U. S., 478; *Towner v. Chicago Railroad*, 69 Wis., 188; *Hodgkins v. Railroad*, 119 Mass., 419.

We are also cited to the case of *Railroad v. Gurley*, 12 Lea, 46. It was this: Gurley was an engineer on the road, pulling a train from Knoxville to Chattanooga, and in his run had to pass Cleveland. The rules of the company required the yardmaster at Cleveland to inspect the switches ten minutes before the arrival of each train. On this occasion the yardmaster had not inspected the switches for two hours before the arrival of Gurley's train, and one of them, a

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split switch, had gotten disarranged, so that when Gurley's train arrived it was thrown on a side-track, where it came into collision with some cars, and thus caused the injuries to the engineer from which he died. The Court held, on this state of facts, that the yardmaster and Gurley, for the purpose of bringing the train safely into the station, were fellow-servants. (Page 56.)

The trial Judge charged the jury that the engineer and yardmaster were fellow-servants, and no exception was made to the charge, but it does not appear that the decision of this case rested upon that question as feature in the case.

We are also cited to the case of *Railroad v. Rush*, 15 Lea, 145. In that case the train to whose crew Rush belonged arrived at a station in the night time, and had to wait for a passenger train to pass. Rush was sent out on the railroad, in the direction from which the passenger train was to come, for the purpose of signaling to the engineer, that he might know a freight train was waiting for him to pass. He put his lamp down on the track, sat down on the end of the cross-ties, and went to sleep. The incoming engineer, it being dark, ran against him and injured him, and Rush sued the company. The Court said: "For another reason the statute ought not to apply. . . . We have held, and his Honor, the trial Judge, charged the jury in this case, that an employee of a railroad com-

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pany, as between him and his employer, undertakes to run all the ordinary risks of the service, and this includes the risk of injuries from the negligence of his fellow-servants. *Railroad v. Handman*, 14 Lea, 423. Our decisions, as shown by the citations in that case, are that several servants, although of different grades, when employed in a common service—as an engineer and fireman on a locomotive, or foreman of a job and a common laborer working on a job, an engineer and assistant fireman—are fellow-servants. And in *Railroad v. Wheelless*, 10 Lea, 741, it was held that the engineer is not the superior, but the fellow-servant of the brakeman as members of the crew of a railroad train. And in *Railroad v. Gurley*, 12 Lea, 46, it was taken for granted that the engineer of a passenger train and the yardmaster of a depot, whose duty it was to turn the switch by which the train was to take the proper rails to reach its stopping place at the depot, were fellow-servants to that end. Precisely for the same reason the engineer of such a train and the servant employed to swing a danger signal to guide the action of the engineer in coming into the depot are fellow-servants.”

The argument is: If the yardmaster in the Gurley case and the engineer pulling a train are fellow-servants for the purpose of bringing the train safely into the depot yard; and if the

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brakeman of a freight train, sent out to signal an incoming passenger train, and the engineer on the latter are fellow-servants, why are the station agent in this case, who oversees the yard and tracks, and the conductor coming into the yard with his train after freight, not fellow-servants?

We are of opinion that the conductor and station agent cannot be considered fellow-servants. Their departments are entirely distinct and separate. The duty of one, the conductor, pertains to the physical moving of trains, and in this case also the coupling and uncoupling of cars when necessary. The station agent's duties did not extend to this, but only to the care of the station buildings and grounds and the transmission to the conductor of such orders as might be sent over the wires for the movement of trains. While in a certain sense both were concerned in the moving of trains, the duty of the one was confined to the physical exertion and personal oversight necessary to move the train, while the other's duties pertained alone to the transmission of any orders or directions that may have been intended for the guidance of the conductor; but the agent was not to execute such orders or aid in executing them. But in transmitting these orders he was really acting as telegraph operator, and this Court has held that such operator is not a fellow-servant with the conductor. *E. T., Va. & Ga. R. R. v. Dearmond*, 2 Pickle, 73.

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The Court was requested to charge as follows: "If you find from the evidence in the case that plaintiff was in the employ of the defendant as conductor, and that a part of his duties was to couple and uncouple cars and to assist in such duties, and that while so employed, and while coupling cars at Slayden, he slipped and fell on a pinch bar lying between the rails of the sidetrack, and you further find that said bar was the property of the railroad company left in charge of the station agent at Slayden, whose duty it was to look after the depot, grounds, and tracks, and you further find that this pinch bar was used by parties loading cars on the sidetracks, and for pushing cars to convenient places for loading, and that some parties not known left this bar on the sidetrack between the rails, and that just before the arrival of the train on which plaintiff was a conductor, the station agent inspected the track, and there were no apparent defects or obstructions on the track, then the defendant is not liable."

The Court gave this charge, with the addition of the following: "But if you find, on the other hand, that the defendant's agent knew that persons were loading and unloading cars at this station before the arrival of the train, and that this company's agent did not investigate to see if the track was clear of obstructions, then the company would be liable."

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The defendant company now assigns error on this action of the Court; that the request should not have been qualified, and in the same connection it is said there is no evidence to support the verdict.

It will be seen that the question presented by this request is independent of the question of fellow-servant, and the point made is that the duty of the master is not absolute, but relative only, and that only reasonable care could be exacted of the station agent, and that reasonable care was exercised in this instance. It is a matter of doubt as to who left this bar on the track. The station agent, Batson, says that the bar was used by persons having cars to load, for the purpose of pushing them along the track; that he gave instructions that it must be kept off the track, and he had never seen it on the tracks but two or three times, and then he laid it off or had it done; that he examined the yards in the morning, just before the train came in, and saw nothing on the tracks, neither the bar nor any other obstruction.

Nelson, the clerk of Batson, says: "I was clerking in Mr. Batson's store, and assisted as depot agent at the time of the accident; was at the station that day. I had the crowbar that morning, using it in moving some cars about two hours before the train arrived. I left it on the track when I got done with it, perhaps on the

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rail, am not certain. The accident occurred about a hundred and fifty yards north of where I left the crowbar. Other people may have used the bar that morning. There were others working there loading staves."

Further on this witness says that he let the Hays boys have the pinch bar that morning to use in moving cars, but does not know whether it was before or after he used it. It clearly appears from other evidence that it was afterwards. The instructions of the Court applied to the facts of the case made it incumbent on the agent to see whether shippers who had been moving the cars in the yards had left the bar on the track or removed it, and the question is, Was this too great a degree of diligence to be required of the master?

We think that it was not error in the Court to give the additional instruction. The agent must have expected these shippers to use the bar, and he might reasonably presume they would leave it where they used it, and it is not shown that the agent gave any caution against leaving it. It was a very dangerous thing to have, especially if left on the rail, and would in all probability have derailed any car that struck it. It was not so dangerous left between the rails, and yet even there it was not free from danger, as is shown by the result in this case. It is described as a short iron bar, and would not appear to

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be dangerous if merely left upon the ground, no more so than a round pebble or any other small impediment over which a man might stumble or his foot slip or turn. But the evidence of the agent himself shows that it was forbidden to be left on the tracks, so that it was evidently regarded by the company as an impediment, dangerous to be left upon it. We think that treating it in this light, as a thing dangerous to be left on the track, the company had not exercised that care that was required of it. The agent had, it is true, examined the track on the morning of the accident, but after that the Hays boys had been engaged in moving cars, and the agent should have examined to see whether they had left the bar exposed on the track.

We think, upon the evidence of the station agent himself, that he did not exercise that care that was necessary and required of him and that he knew that it was his duty to observe.

We therefore see no reversible error in the record, and the judgment of the Court below is affirmed with costs.

Stacker v. Railroad.

STACKER v. RAILROAD.

(Nashville. February 16, 1901.)

1. **ASSIGNMENT OF ERROR.** *Insufficient, when.*

Assignment of error on account of exclusion of evidence is insufficient when it fails to cite the pages of the record where the questions and proposed answers may be found. (*Post*, p. 451.)

2. **SUPREME COURT.** *No reversal for exclusion of evidence, when.*

This Court will not reverse on account of the lower Court's refusal to permit a witness to answer a competent and relevant question, unless it appears affirmatively in the record what answer the witness would have made, and that such answer would have constituted relevant and material evidence. It is not sufficient for counsel merely to say that he expected the witness to prove other facts. (*Post*, pp. 451, 452.)

3. **SAME.** *No reversal for admission of evidence, when.*

This Court will not reverse on account of the admission of incompetent evidence, unless the record shows that proper exception was made in the lower Court. (*Post*, p. 452.)

4. **CHARGE OF COURT.** *Refusal of request proper, when.*

Court's refusal to charge a correct request is not reversible error where the matter has been fully covered by the original charge. (*Post*, pp. 452, 453.)

5. **VERDICT.** *Not set aside, when.*

A verdict will not be set aside for want of evidence to support it where the theory of each party was supported by evidence,

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and the question for the jury to determine was where the weight of the evidence lay. (*Post*, pp. 453, 454.)

FROM MONTGOMERY.

Appeal in error from Circuit Court of Montgomery County. W. M. BRANDON, Sp. J.

FORT & SCALES for Stacker.

LEECH & SAVAGE for Railroad.

WILKES, J. This is an action for damages for personal injuries. It was brought by an infant through his next friend. There was a trial before a jury in the Court below, and a verdict and judgment for the defendant, and plaintiff has appealed and assigned errors.

The second, third, fourth, and fifth assignments are to the refusal of the Court to allow a certain line of testimony to show the habit and custom of the defendant, and the general conduct of the employees of the road toward children, and their conduct toward plaintiff on previous occasions. The pages of the record where this evidence is to be found, and exceptions made to the ruling of the Court thereon, are not given, so that the assignment does not comply with the rules. Looking to the record, however, we find

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several instances where such evidence was offered and disallowed, but in none of the instances does it appear what the witness would have stated if allowed to answer the questions. It is true that counsel in making his exceptions said that he expected the witness to state further facts, but whether the witness would have met these expectations of counsel does not appear. These assignments, therefore, for both reasons stated, cannot be considered. But in addition it appears that plaintiff, Geo. Stacker, was allowed to prove that he had been often called upon to help turn the engine by the employees of the road. So that this testimony, though incompetent, did get into the record.

It is said that the Court erred in allowing third persons to state what the boy's mother said to him soon after he was hurt, to the effect that she had warned him to keep away from the turntable, and that he was hard-headed. The pages where this testimony is to be found are not given, but in examining the record we find that two or more witnesses were asked as to these statements made by the mother, but no exceptions were made to the questions or answers so far as we can see from the record, and for these reasons this assignment is not well made.

It is said the Court erred in not charging the jury that a minor is only chargeable with negligence to a degree equal to his capacity for dis-

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cerning danger. It does not appear that the trial Judge was asked to charge this language. He did charge upon the feature of the case presented by this request, and as we think correctly, and there is no error in this assignment.

It is said there is no evidence to support the verdict. The plaintiff was a boy about twelve years of age. His foot was caught at a turntable and slightly injured. His version is, that he was called by the employees of the road to come to the turntable and assist in pushing the engine around. In this he is corroborated by two other boys about his age, and who it appears were with him. On the contrary, three of the company's employees, who were present and handling the engine, state that they did not see the boys there; that they were not called or invited to come to the turntable, and if they were there they were so concealed as not to be seen.

It appears from the proof that these and other boys had often been warned away from this turntable by employees of the road, and told that it was dangerous, and the evidence tends to show that they kept themselves out of sight of the employees on this occasion, and were not seen until the accident occurred.

There were two theories of the case presented to the jury: one that the boys were invited or told to come to the engine and help to push it, by the railroad employees, and plaintiff was hurt

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while so doing, and the other is that the boys were often warned to stay away from the turntable, and were present on this occasion without the knowledge of the railroad employees. Both theories were supported by some evidence. The jury has given credit to that of the road, and there is evidence to sustain it, and the judgment of the Court below is affirmed with costs.

Nichols v. Cecil.

NICHOLS v. CECIL.

(Nashville. February 16, 1901.)

1. CHANCERY PLEADING AND PRACTICE. *Proof of averments of bill and answer essential, when.*

Averments of bill, not admitted by answer, must be proved. So, likewise, averments of answer not responsive to bill must be proved. (*Post*, pp. 460, 462-464.)

2. SAME. *Answer not in confession and avoidance, but in denial, when.*

Averments of answer are not in confession and avoidance, but constitute a denial of the contract set out in the bill that puts complainant to proof thereof, which admit the terms of the contract as set out in the bill, but state, in addition, that the contract contained other material provisions and stipulations. (*Post*, pp. 462-464.)

3. SAME. *Bill of exceptions essential to preserve evidence heard on jury trial.*

Evidence heard on jury trial of issues in a chancery cause does not constitute part of the record on appeal to this Court unless it has been preserved and made such by bill of exceptions. (*Post*, pp. 459, 460, 465.)

4. SUPREME COURT. *Will not sustain verdict on jury trial of chancery cause, when.*

When, on a jury trial of issues in a chancery court, a vital controverted fact—*e. g.*, the existence and terms of the contract sued on—is not submitted to or found by the jury, this Court cannot sustain a decree based upon a verdict in favor of complainant, in the absence of evidence, made part of the record

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by bill of exceptions, establishing the contract independently of the jury's verdict. (*Post*, pp. 464-466.)

FROM MAURY.

Appeal from Chancery Court of Maury County.
A. J. ABERNATHY, Ch.

E. H. HATCHER and FIGURES & PADGETT for
Nichols.

W. B. GORDON and G. T. HUGHES for Cecil.

McALISTER, J. The object of this bill is to recover damages for the alleged breach of a warranty in the sale of wheat. The bill alleges that about August 25, 1897, complainant and defendant entered into a contract whereby it was agreed that defendant would sell and deliver at once, free on board cars at Ashwood, Tenn., 6,000 bushels of No. 2 wheat, and upon delivery thereof complainant should pay defendant the sum of one dollar per bushel for such wheat, the defendant warranting that said wheat should be No. 2 wheat. Soon after the contract was made defendant notified complainant that he had delivered the wheat on board the cars at Ashwood, whereupon complainant paid defendant for the entire quantity, about 6,000 bushels, according to contract, relying

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upon the defendant's statement and warranty that said wheat was No. 2 wheat, which is the highest grade known to the trade. Complainant did not examine and inspect said wheat so delivered at Ashwood, nor did he see it at all, but relied upon the warranty. It is then alleged that complainant shipped 2,730 bushels of this wheat to a purchaser at Nashville, representing it to be No. 2 wheat, but the wheat was rejected, and graded only as No. 4 wheat. Complainant thereupon gave defendant notice that the wheat was not up to the warranty, and was held subject to his order. But defendant refused to receive the wheat or refund the money, whereupon complainant sold it at a loss of \$543.70, and to recover this amount brings this bill.

Defendant, in his answer, admits he sold the wheat to complainant as No. 2 wheat, and that the same was to be delivered f. o. b. the cars at Ashwood, Tenn. Defendant further avers that he did say to complainant that he would make the wheat delivered at Ashwood No. 2 wheat if the same was not up to grade when delivered. Defendant avers that his agreement with complainant was that it should be made No. 2 wheat at the place of delivery and acceptance, namely at Ashwood, but he did not undertake nor would he have contracted with complainant that said wheat would grade No. 2 wheat at the Liberty Mills in Nashville, or any other market, in view of

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the uncertainty and fluctuations of the market at that time.

Defendant further avers that he delivered the wheat at Ashwood according to contract; that it was No. 2 wheat, and if it was not up to grade it was complainant's duty to inspect and reject it, and that having accepted it, he could not ship it to another market, and it being rejected there, throw it back upon defendant. There is a general denial of all the allegations of the bill not specifically denied.

Complainant filed an amended bill, in which he alleged that he purchased this wheat of defendant for speculation, to be shipped to Nashville and other markets, and that this fact was well known to defendant.

Defendant answered the amended bill stating that he supposed complainant did buy this wheat for speculation, and that he would ship the wheat away from Ashwood for sale. But defendant repeats that under the contract the wheat was to be received, inspected, accepted or rejected at Ashwood, the place of delivery, and if the wheat upon inspection at Ashwood had not come up to the grade of No. 2 wheat, defendant could at little expense have caused said wheat to be refanned, etc.

This is a condensed statement of the case as made in the pleadings. Defendant demanded a jury, to whom formal issues were submitted under

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the direction of the Chancellor, together with the evidence produced on the trial. The material issues submitted, together with the findings of the jury, are, viz.:

1. Was any portion of the wheat delivered by the defendant to complainant at Ashwood, under his contract, inferior to No. 2 wheat?

Ans. There was.

2. How much wheat was inferior to No. 2?

Ans. 2,691 bushels.

9. Did not complainant receive and accept the wheat at Ashwood, the place of delivery?

Ans. Yes, as per contract.

10. What amount of damage did complainant sustain by reason of the delivery of inferior wheat to him by defendant?

Ans. Three hundred and twenty-two dollars and ninety-two cents.

The Chancellor, upon the verdict of the jury, pronounced a decree in favor of complainant for \$322.92. Defendant appealed. The Court of Chancery Appeals reversed the decree of the Chancellor and dismissed the bill. Complainant appealed to this Court, and has assigned errors.

At the last term of this Court the decree of the Court of Chancery Appeals dismissing the bill was affirmed. A rehearing, however, was granted, and the case has been reargued at the present term.

It is to be remarked, in the first place, that

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none of the evidence heard by the Chancellor was preserved by bill of exceptions, but only the pleadings, the findings of the jury, and the decree of the Chancellor are embodied therein.

The cardinal and fundamental question arising upon the record is, What was the contract between the parties?

The Court of Chancery Appeals correctly states that "it becomes apparent that none of the charges of the bill can be taken as true unless admitted in the answer or sustained by the findings of the jury. And it is equally true that no affirmative statement in the answer which it would be necessary for the defendant to prove can be taken as true, unless sustained by one of the findings of the jury."

But that Court undertakes from the pleadings to find the contract between the parties, concluding, viz.: "We therefore find (from the pleadings) that the parties agreed that wheat to the amount of five thousand five hundred bushels, which should be No. 2 wheat, was to be sold and delivered by the defendant to the complainant f. o. b. cars at Ashwood, Maury County, for which defendant was to be paid one dollar per bushel. To this extent (says that Court) the parties are agreed, but no further on this phase of the case."

This Court is of opinion that the contract between these parties cannot be determined from the pleadings, for the following reasons:

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The bill alleges that defendant sold complainant No. 2 wheat, to be delivered on board the cars at Ashwood, warranting that it should be No. 2 wheat, the highest grade on the market. It is further alleged that at the time said contract was made the defendant said that if it was not No. 2 wheat he would make it No. 2 wheat.

Respondent admits that he sold to complainant said wheat as No. 2 wheat, and that the same was to be delivered by him at Ashwood, f. o. b. c.

“And respondent further says that he did say to the complainant that he would make the wheat delivered by him at Ashwood No. 2 wheat, if the same was not No. 2 when delivered; or, in other words, his agreement was that if any of the wheat sold by him, which was to be delivered by him and received by complainant at Ashwood, was not No. 2 wheat, he agreed that it should be made No. 2 at the place of delivery and acceptance.”

It will be observed that both complainant and defendant agreed that Ashwood was the place of delivery, and that the wheat was warranted to be No. 2 wheat. It is also agreed that the wheat was accepted by complainant at Ashwood, and the purchase price paid in full. But at this point defendant in his answer introduces a new term, which he avers was a part of the contract, namely: that the wheat was to be accepted or rejected at the place of delivery, to wit, Ashwood.

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The answer admits the contract alleged in the bill, but avers that it contained other and additional terms or provisions which are not therein stated, but which are material and fundamental.

Counsel for complainant, in support of the contention that the contract alleged in the bill is admitted by the answer, cites Gibson's Suits in Chancery, Sec. 460, page 415, viz.:

"When the answer sets up matter in avoidance, it is not evidence for the defendant, because he is not a witness, except in so far as he is required to answer; when, therefore, he sets forth in his answer matter in avoidance, or other matter not referred to in the bill, to that extent his answer is not responsive, and therefore not a deposition, but a mere pleading. Hence matters in avoidance set up in an answer must be proved by the defendant; and, if he fails to prove them, the complainant will be entitled to a decree."

It is insisted, however, by counsel for defendant that when complainant states in his bill a contract in certain terms, and the defendant in his answer admits the existence of those terms, but alleges that the contract contained other terms and conditions not mentioned in the bill, this is a denial of the contract alleged, and is not a defense by way of confession and avoidance which admits the contract as charged, but seeks to avoid it by extraneous matter.

We are constrained to hold this contention sound,

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and that the matter in defense is not in confession and avoidance. "Every pleading by way of confession and avoidance in reference to its subject-matter goes either in discharge of the cause of action or in justification or excuse, which denies that there ever was any. 1 Chitty's Pleading, 16 Am. Ed., 551. A plea in discharge is one which admits that the plaintiff had a cause of action, and tends to show that it was discharged by some subsequent or collateral matter. Tidd's Pr., 4 Am. Ed., 642-645. An illustration of the plea in discharge would be that before action the defendant had satisfied and discharged the plaintiff's claim by payment. A plea in justification or excuse admits the facts alleged by the plaintiff, but in effect denies that the plaintiff had at any time a good cause of action either because the conduct of the defendant is justified in law under some legal right or because he is excused from liability in the particular case through some act or conduct of the plaintiff. This is also called an avoidance in law. Tidd's Practice, 4 Am. Ed., 641; Am. & Eng. Enc. Pl. & Pr., Vol. 4, p. 665. It will be observed that under the plea of confession and avoidance, whether the matter relied on is in discharge of the original cause of action or a justification for non-performance, the matter pleaded is subsequent or collateral to the main undertaking. Therefore,

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it is obvious that the averment in this answer of additional terms and stipulations as part of the original contract is not, under any rule of pleading, matter in confession and avoidance, but is the averment of a new and substantive contract.

The answer in this case is responsive to the bill, and hence complainant is not entitled to use the admissions of the defendant's answer to charge him without giving him at the same time the benefit of the matters of discharge with which the admissions are coupled. *Beech v. Haynes*, 1 Tenn. Ch., 569. We cannot, therefore, upon the pleadings determine the contract between the parties.

The next inquiry is whether the contract is established by the findings of the jury. No issue was submitted to the jury on the terms of the contract, and hence there is no finding upon this subject. The most vital question in the case was thus wholly ignored, and other issues propounded and answered which are not determinative of the litigation. The Court of Chancery Appeals was of opinion that the ninth issue and finding was conclusive of the case in favor of the defendant. That issue was as follows:

"Did not complainant receive and accept the wheat at Ashwood, the place of delivery? *Answer* Yes, as per contract." Counsel for the respective parties differ widely in their interpretation of this

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finding of the jury. On behalf of defendant, it is insisted that this answer and finding of the jury is conclusive of the question that there was no warranty of the wheat beyond its acceptance at Ashwood, while, on the other hand, complainant's counsel maintain that it means nothing more than that the wheat was accepted and paid for under the warranty. While we must presume there was ample evidence to sustain the finding of the jury, the question still remains whether the verdict of the jury supports the contention of complainant or defendant. We have no means of determining this question in the absence of proof of the contract.

This Court cannot presume there was sufficient evidence before the Chancellor to warrant him in finding the contract, for the reason that question not having been found by the jury would be triable *de novo* in this Court, and the record contains no evidence establishing the contract.

As to all issues submitted to the jury, this Court would presume, in the absence of a bill of exceptions preserving the evidence, that the findings of the jury were well sustained. But this Court cannot correctly interpret the findings of the jury without being advised as to the contract. This is the beginning corner of any investigation of the rights of the parties, and no matter what else appears, if there is no contract

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shown or found by the jury, this Court cannot undertake to pronounce a decree for breach of contract. This case has been presented to this Court by counsel as if the contract were in some way shown, but its terms are not even agreed on in argument.

In this anomalous state of the record the Court thinks it would be inequitable to pronounce a decree in favor of either party, but that the cause should be remanded in order that proper issues may be formulated and submitted to the jury for the ascertainment of the contract. The costs of the appeal will be equally divided.

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Payne v. Payne.

PAYNE v. PAYNE.

(Nashville. March 9, 1901.)

CHANCERY PLEADING AND PRACTICE. *Petition does not lie to enforce attorneys' lien, when.*

If attorneys, who have filed a divorce bill for the wife, attaching property of the husband, have, under Acts 1899, Ch. 244, any lien at all for services upon the attached property after the wife's voluntary dismissal of her suit, such lien cannot be enforced by petition filed in the original cause, without attachment of the property, six months after final decree upon such voluntary dismissal, and after the term of court at which said final decree was rendered has passed. The Court's intimation seems to be against the existence of such lien, but the question is not decided.

Cases cited: Pleasant v. Kortrecht, 5 Heis., 694; Hunt v. McClanahan, 1 Heis., 503; Covington v. Bass, 88 Tenn., 496.

FROM TROUSDALE.

Appeal from Chancery Court of Trousdale County. J. S. GRIBBLE, J.

DISMUKES, FOUST, and McMURRAY & McMURRAY for Maggie Payne.

JAMES T. MILLER for Richard B. Payne.

WILKES, J. This is an attempt to have declared and enforced an attorney's lien upon the

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complainant's right of action in a suit for divorce and alimony.

The attorneys assume to come into the original divorce case by a petition to have their right to a lien declared under the provisions of the Act of 1899, Chap. 243.

The original bill sought divorce upon the ground of adultery, and attached certain real and personal property belonging to the husband.

In the fiat of the Chancellor granting the attachment, he directed that the exempt personal property attached should be turned over to the wife, to be used and controlled by her for the support and maintenance of herself and her children, until the further orders of the Court. In addition to this personal property, land of the value of \$4,000 was attached, as the property of the husband, and some other personal property was seized besides that which was exempt, the whole amounting to about \$1,000.

The property was attached under the fiat of the Chancellor on the 7th of December, 1899. On the 13th of that month the complainant, by written order before the Clerk, directed the suit to be dismissed and withdrawn. When Court convened, and on the 16th of January, 1900, complainant, by different attorneys, procured an order for the withdrawal of the exhibits to her original bill. The attorneys originally representing her

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thereupon applied to the Court to be made parties and allowed to resist her application to dismiss the suit, claiming a lien on the property attached for their reasonable fees. The Chancellor dismissed the divorce proceedings, and held that the attorneys who filed the original bill were not entitled to any lien. A bill of exceptions was taken by the attorneys, and they prayed an appeal, which the Chancellor denied them.

About six months thereafter the original attorneys filed a petition in which they alleged the filing of the bill and the subsequent steps taken in the case, and asked for a reference to ascertain their fees and to have the same declared a lien upon the attached property, and that it be sold to pay whatever amount they might be adjudged entitled to receive.

This petition was filed against the husband and wife, and was answered by the husband, who set up the fact that the suit of the wife for divorce was dismissed by her, and he denied that the attorneys acquired any lien upon the attached property.

Upon the case as thus presented the Chancellor dismissed the petition with costs, and the petitioners appealed.

In the Court of Chancery Appeals the case was treated as though the exempt property ordered by the Chancellor to be turned over to the

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wife was alone involved, and after an elaborate discussion that Court was of opinion that the petitioners had a lien upon the property, not under the Act of 1899, but upon the theory that the property had been attached and impounded by the attorneys, and could not be released to their prejudice, basing their holdings upon the rulings of this Court in *Pleasant's Administrators v. Kortrecht*, 5 Heis., 694; *Hunt v. McClanahan*, 1 Heis., 503; *Covington v. Bass*, 88 Tenn., 496. That Court was of opinion, however, that this would not prevent the wife from dismissing her suit, if she saw proper so to do, over the protest of the attorneys as to the divorce.

That Court was, however, of the opinion it could grant petitioners no relief, since they had not attached or impounded the property upon which they claimed and sought to enforce their lien, and it remanded the case to the Court below that an amended petition might be filed attaching the property if it was still in the possession of the husband or wife, so that the Court would have the jurisdiction and power to enforce the lien. Both parties have appealed to this Court.

This Court is of opinion that in the shape we find this record the petitioners can have no relief. Whether the Chancellor should have granted them an appeal when they first attempted to as-

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sert their lien by motion and it was refused, we are not called upon to decide, as it is not now involved.

But the petition in this case was not filed until six months after the case itself had been dismissed and the costs adjudged by a decree final in its form and effect. In order to have obtained relief, if entitled to it at all, which we do not by any means concede, it would have been necessary to file an original bill and impounded or in some way seized upon the property upon which the lien was claimed. It could not be done by a petition in a case already dismissed, and when there was no seizure of the property, even by assent of the Chancellor below. We are of opinion, therefore, the Court of Chancery Appeals is in error, and that no relief can be granted the petitioners in this proceeding, in any event.

The decree of that Court is reversed, and the cause dismissed. The petitioners will pay costs of appeal.

Insurance Cos. v. Estes.

INSURANCE COS. v. ESTES.

(Nashville. January 19, 1901.)

1. **INSURANCE, FIRE.** *Vendor's lien on insured property and suit to enforce it does not avoid policy.*

The existence of an undisclosed vendor's lien upon insured property, and the institution of proceedings, with the insured's knowledge, to enforce it, does not operate to render a policy void which contains this provision, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if, with knowledge of the insured, foreclosure proceedings be commenced with notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed." (*Post*, pp. 473-478.)

Cases cited: *Delahay v. Memphis Insurance Co.*, 8 Hum., 684; *Manhattan Insurance Co. v. Barker*, 7 Heis., 504; *Insurance Co. v. Crockett*, 7 Lea, 725; *Light v. Insurance Co.*, 105 Tenn., 480.

2. **CHARGE OF COURT.** *Called for by evidence.*

It is not error for the Court to instruct the jury upon an aspect of the case, which, though not supported by direct and positive evidence, is supported by circumstances sufficient to justify and sustain a verdict. (*Post*, pp. 478-481.)

3. **EVIDENCE.** *Unstamped deed admissible as.*

The fact that a deed, or other instrument, has not an internal revenue stamp upon it, as required by federal statute, does not render it inadmissible or ineffectual as evidence in the State courts. Congress has not the power to provide for the exclusion of deeds or other instruments as evidence in the State courts for want of internal revenue stamps, and, upon a proper construction of the federal statute, has not undertaken to do so. (*Post*, pp. 481-489.)

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Cases cited: *Sporrer v. Eifler*, 1 Heis., 638, overruling *Miller v. Morrow*, 3 Cold., 587; *Miller v. Morrow*, 5 Heis., 689; *Walt v. Walsh*, 10 Heis., 321; *Baugess v. Partee*, 2 Shann. Cas., 269.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County.

J. J. VERTREES and J. A. CARTWRIGHT for Insurance Companies.

H. A. LUCK and RUTHERFORD & RUTHERFORD for Hunter.

R. O. ALLEN for Estes.

McALISTER, J. These actions were commenced separately to recover on policies of fire insurance. The same questions being involved in both suits, they were consolidated in the Court below and heard together. The trial resulted in a verdict and judgment against each company for the sum of \$1,000, the amount of its policy, with interest. Both companies appealed, and have assigned errors.

The declarations allege that on the thirteenth of February, 1899, the defendant companies issued to the plaintiff, E. M. Estes, policies of fire insurance for the sum of \$1,000 each on a certain

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mill building, machinery, etc., known as Brentwood Mills, situated in Williamson County, Tenn. The policies contained a clause "loss, if any, payable to W. A. Hunter, Jr., as his interest may appear."

On the first of April, 1899, said building, machinery, etc., were totally destroyed by fire, without the fault of the plaintiff. Defendant companies were notified of the loss, and within the time prescribed by the policies, the plaintiff filed with defendants proofs of loss, and defendants, although often requested to pay said loss, have wholly failed and refused to do so.

Defendants pleaded the general issue, and also following special pleas, to wit:

"1. That at the time the insurance was applied for and obtained the plaintiff stated and represented to the defendants that he owned the entire interest in the property insured, and the policy itself contains such representation, but as a matter of fact the plaintiff was the owner only of an undivided interest in the property, and not the whole thereof, which undivided interest was incumbered by a vendor's lien in favor of one W. A. Hunter for \$1,260.80, which is unpaid, and also by a trust mortgage in favor of one J. E. Vandergrift for \$100, unpaid, whereof the defendants then had no knowledge."

It is further averred that the contract of insurance contains the following clause, to wit:

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"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if, with knowledge of the insured, foreclosure proceedings be commenced with notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed."

Defendants further aver that "at the time of the issuance of the policy sued on, or about the twelfth of January, 1899, the property insured was incumbered by a vendor's lien in favor of one W. A. Hunter, and of which the defendant had no knowledge, and that on the first day of March, 1899, the said Hunter exhibited his bill in the Chancery Court of Franklin, Williamson County, Tenn., to enforce or foreclose said lien against the property for the payment of \$1,260.80 due and secured by said lien as aforesaid. Defendants aver that plaintiff had notice or knowledge of said foreclosure proceedings before the destruction of the property insured, but that defendant had no notice thereof, wherefore defendants say said policy is utterly void."

Plaintiff demurred to this last or third plea, the demurrer was sustained, and this action of the Court is assigned as the first error.

It will be observed that the foreclosure pro-

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ceedings mentioned in the policies relate to mortgages or deeds of trust. But it is insisted on behalf of the company that the clause of the policy in question applies with equal force to proceedings to enforce a vendor's lien, and that there can be no difference in principle, under the clause quoted, between the foreclosure of a vendor's lien and the foreclosure of a mortgage or deed of trust.

In *Delahay v. Memphis Ins. Co.*, 8 Hum., 684, it was held that a failure on the part of assured to disclose the existence of a mortgage on the property is not a circumstance material to the risk, and will not avoid the policy. The reason given for the ruling is that a mortgage or deed of trust is only a security for the debt, and if the property be destroyed the debt remains, so that the assured has as much interest in protecting the property as if there were no incumbrance on it.

In the case of *Manhattan Ins. Co. v. Barker*, 7 Heis., 504, it was a condition of the policy that it should be void if the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, and this be not represented to the company. It appeared in that case there was an undisclosed vendor's lien on the goods sold, but the Court held that fact did not avoid the insurance.

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It was held that the equitable owner of property is "the entire and sole owner" within the meaning of the policy. The reasoning of the Court was that if the existence of a lien by a regular mortgage undisclosed does not vitiate a policy, then one based merely on the retention of title by the vendor would have no more effect.

So in *Insurance Co. v. Crockett*, 7 Lea, 725, the policy provided, as in this case, that if the interest of the insured in the property be any other than the entire, unconditional, and sole ownership for the use of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." It appeared that the assured only had a title bond to the premises. Held, the policy was not avoided, inasmuch as the failure to disclose the fact that the property was incumbered, was not material to the risk. The same principles were reaffirmed by this Court in *Light & Co. v. Insurance Co.*, 21 Pickle, 480.

If, then, the existence of an undisclosed mortgage, deed of trust, or vendor's lien on the property insured will not invalidate the insurance, we cannot perceive how, on principle, notice of foreclosure of the mortgage or vendor's lien could have that effect, notwithstanding such a stipulation in the policy. Foreclosure proceedings are of

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course the remedy of the mortgagee for non-payment of his debt on maturity of the mortgage, or when the same is overdue. The remedy is an incident of the mortgage, and while the ownership of the property may thus be changed during the currency of the insurance, it is a result that is brought about by the existence of the mortgage. The fact of the existence of the mortgage, as we have already seen, does not vitiate the insurance.

The next assignment is, that the Court erred in charging the jury on the subject of the equitable ownership of the property.

The facts necessary to be stated in this connection are that W. A. Hunter, Jr., originally owned said mill, and sold it by deed to Dobson & Roser, retaining a vendor's lien to secure unpaid purchase money. On August 31, 1898, Dobson and wife, by deed, conveyed to the plaintiff, E. M. Estes, a one-third interest in said property, Estes assuming the payment of one-third the purchase money due Hunter. On October 12, 1898, Dobson and wife sold their remaining one-third interest in said mill to the plaintiff, E. M. Estes, the latter assuming another third of Dobson's indebtedness to Hunter. It is not disputed that these two deeds were executed and delivered to Estes, and the purchase money paid by him. It further appears that on December 30, 1898, Dobson and wife and Roser and wife joined in

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a deed conveying to Estes the remaining one-third interest in the mill property, Estes assuming payment of balance of purchase money due Hunter. This last deed recites that \$200 was paid in cash, and notes executed for the balance, and that the other two-thirds of said tract had been "by us heretofore sold to said Estes by deed which is hereby ratified and affirmed." It is further recited that it was the intention of the grantors to transfer the whole of said tract known as the "Brentwood Mills Tract." Roser and wife signed and acknowledged this last deed, and left it at Esquire Rose's office, where Dobson later signed and acknowledged same. It is insisted on behalf of defendants that this last deed was never in fact delivered by the grantors to Estes, the plaintiff, and hence the latter was not the sole owner of the property at the time the insurance was effected and when the loss occurred. Estes died before the trial, and in the absence of his testimony there was some confusion about the delivery of the last deed.

Estes swears in his proofs of loss that he was the owner of the entire property. Dobson testifies that the entire purchase money due him had been paid, and that Roser told him that he had sold his entire interest to Estes. Roser and wife, it appears, have removed from the State, and their evidence was not heard. Roser and wife

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have never filed with the administrator of Estes any claim for unpaid purchase money.

It appears that Estes applied for and obtained the insurance January 12, 1899. At that time it was conceded that he owned a two-thirds undivided interest in the mill property, and that he had contracted for the remaining one-third interest, but it is denied that the deed to this remaining one-third interest has ever been delivered to him. It is also shown by the proof that at the time Estes took out the insurance he told Hart, the agent, that he owned two-thirds of the mill property, and had contracted for the remaining one-third interest. Now, upon these facts in proof, it is assigned as error that the Court charged the jury as follows, namely:

"If you find from the proof that E. M. Estes had previously purchased and obtained deeds to two-thirds of the property insured; that subsequently he contracted verbally for the purchase of the remaining third; that pursuant to such verbal agreement Estes paid in cash the sum of \$200, with the understanding that the vendors would execute a deed and deposit the same with an attorney, to be by him delivered to Estes as soon as the balance of the purchase money was paid in full; if you further find that said balance was paid, and the deed subsequently delivered as agreed, then, in such case, Estes would be the equitable owner of an insurable interest in the

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property under the terms of the two policies, and your verdict should be for the plaintiff in both cases.”

It is not insisted that this charge is erroneous as an abstract proposition, but the claim is that there was no evidence whatever that the deed was to be retained to be delivered upon the payment of the notes. It is insisted, further, that there was no evidence that the notes were paid, or that the deed was ever delivered. It is true there is no direct and positive testimony that the notes were paid, or that the deed was ever delivered, but we think from the facts and circumstances already recited the jury were well warranted in believing that the notes had all been paid, and that the deed had been executed and delivered to Parham for the vendee, Estes.

The next assignment is the Court erred in admitting as evidence the three deeds to Estes dated, respectively, October 18, 1898, August 20, 1898, and December 30, 1898, for the reason they were not stamped. The War Revenue Act, enacted by Congress in 1898, provided that certain instruments, including deeds, should be stamped. Section 13 provides “that if a document required to be stamped is either issued or recorded without being duly stamped, with intent to evade the law, the person offending shall be guilty of a misdemeanor,” and it further provides that such

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instrument, document, or paper not being stamped according to law, shall be deemed invalid and of no effect.

Section 14 provides "that hereafter no instrument, document, or paper required by law to be stamped, which has been signed or issued without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted or used as evidence in any Court until a legal stamp, or stamp denoting the amount of tax, shall have been affixed thereto as prescribed by law."

This question first arose in this State in 1867, in the case of *Miller v. Morrow*, 3 Cold., 587, under the Internal Revenue Acts of 1862-64-65-66. In that case, Judge Shackelford delivering the opinion, the Court held that the Act of Congress which forbade the recording and using in evidence any instrument, document, or paper required by law to be stamped, unless a stamp of the proper amount shall have been affixed, was applicable alike to the proceedings in State and Federal Courts, and hence that a deed registered without being so stamped was invalid as evidence and as a muniment of title.

A petition to rehear was granted, and the cause was thereafter continued from term to term. In the meantime the case of *Sporrer v. Eifler*, 1 Heis., 638, was decided, in which the Court reached a directly contrary conclusion. Judge Tur-

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ney, in delivering the opinion in the case, said: "There has been no delegation by the States to Congress of power or authority to legislate for the internal regulation of the States, nor are the people of the State prohibited by the constitutions from creating and regulating the Courts of the States, and declaring the rules for their government. The Legislature of the State is the only power that can enlarge or contract the rules of evidence or create and enforce new rules in the Courts of the States. If Congress may by its enactments make a change of the rules of evidence as applicable to the Courts of the States in any one particular, it may in all things. It follows," said the Court, "that stamps are not necessary to the validity of the paper as a muniment of title, nor to its competency as evidence in the Courts of the State." This case had been decided when *Miller v. Morrow* was finally heard, and the Court reversed the former ruling and adhered to the opposite view of the law as announced in *Sporrer v. Eifler*, 1 Heis. The case of *Miller v. Morrow* on the second hearing is reported in 5 Heis., 689. These rulings were afterwards followed in *Walt v. Walsh*, 10 Heis., 321, and in *Baugess v. Partee*, 2 Shannon's Cases, 269.

An able argument has been submitted attacking the soundness of the views expressed in *Sporrer v. Eifler*, 1 Heis., and insisting that the rule

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announced in *Miller v. Morrow*, when first decided and reported in 3 Cold., is the correct doctrine. But we are satisfied, after an extended examination of the cases, that the great weight of authority sustains the ruling in *Sporrer v. Eifler*, 1 Heis.

Prof. Wharton, in his work upon the Law of Evidence, Sec. 697, thus lays down the rule that should govern in such cases: "Under the Federal statutes of 1864 and 1866, providing that instruments without stamps should not be received in evidence, the question frequently arose whether stamps were necessary prerequisites to the reception of instruments in State Courts. As to this question it is now only necessary to say that if the statutes in this respect controlled the State Courts, then there would be no other department of State or local law, whether as to principle or practice, which Congress, at least by subjecting litigation of the particular point to a tax, would not in like manner be able to control. To admit the constitutional right of Congress, therefore, to attach limitations to the reception of evidence in the State Courts, would be to admit the right of Congress to control the materials on which the decisions of the Courts of particular States should be based. That the limitation in question was not within the power of Congress, was ruled by a series of State Courts. In other jurisdictions, however, this limitation of the scope of

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the statutes has been denied, though on reasoning which it is difficult to reconcile with the tenor of authorities in this branch of private international law or with the sovereignty conceded by the Federal Constitution to the States in all matters of process and evidence. A stamp Act has no force on the principles of international law, unless imposed by the local sovereignty; and to concede sovereignty to the Federal Government as to the evidential rules of State Courts is to surrender State sovereignty in one of its prime functions."

It is worthy of remark that Prof. Wharton, in announcing the rule of evidence on this subject, gives substantially the same reasons as those expressed by Judge Turney in *Sporrer v. Eifler*, decided many years anterior. That case was among the first to announce the rule, and its primacy as a precedent has been recognized and followed in the adjudications of other States until now it is the firmly established doctrine.

It will be observed that the War Revenue Act of 1898 not only declares that an unstamped deed shall not be received or used as evidence in any Court, but adjudges it invalid and of no effect. If the power to invalidate the contracts of the citizens of a State because unstamped resides in the National Legislature, it must be derived alone from that provision of the Federal Constitution which authorizes Congress to levy

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taxes, duties, imposts and excises, and to provide for the payment of the debts and expenses of the Union. But, as said by the Court in *Latham v. Smith*, 45 Illinois, "the power of Congress to tax these instruments can be effectually carried out by the imposition of a fine upon the negligent party, if willfully so, and the innocent payee (or contractee) fully protected without any encroachment upon the right of the State to make the instrument valid as evidence in its own Courts, and for all other purposes germane to its execution."

That Court further said "while we concede to the Congress the right to lay and collect taxes, duties, imposts and excises to pay the debts of the Union, we deny its power to go into the States, and under a pretense of laying and collecting such taxes, take away from the States legitimate and long established rights which they have ever and for their own preservation must be allowed to exercise without question. The principle of the case of *McCullough v. Maryland*, 4 Wheat., 316, sanctions this view.

If our system of government is to remain what the wise and good fashioned it, a strictly federative system, the States sovereign over all subjects within their proper sphere of action, as the general government is over all subjects confided to it by the Constitution, then no power exists in the Congress to declare by law what shall or

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shall not be evidence in a State Court, and what domestic contracts made by the people of the States, in virtue of their own laws, and having no connection with the Federal government, shall be valid or the contrary. The general government is as powerless in this regard as a State would be which should attempt to interfere with the subjects and rights exclusively confided to the "general government."

On this subject the Supreme Court of Mississippi, in *Davis v. Richardson*, 45 Miss., 499, said: "Action upon a contract, objection to admitting the written contract as evidence, on the ground that the revenue stamps had not been placed thereon. While the power of taxing the property, occupations, and business transactions, including contracts purely local and domestic, is asserted and sustained, yet it does not draw with it, as an incident, the right to exceed the taxing power. Congress may punish, as it proposes to do in the Acts of 1864 and 1866, for an evasion and failure to pay the tax. It may provide stringent means of collection by sale and distress. . . . Under the power to levy and collect taxes all these means may be employed as incidental, but under the taxing power Congress cannot intervene in the States and impose new conditions upon the alienations and conveyances of real estate. It cannot say that a deed, complete and perfect according to the local law, shall not be evidence

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in the State Court unless it conforms to a requirement not exacted by the State, but prescribed by Congress.

Knox v. Rossi, 48 L. R. A., 305. Depositions objected to on the ground that the certificate was not stamped according to the provision of the Revenue Act 1898. Following *Carpenter v. Snelling* the Court said (quoting from that case): "This provision can have full operation and effect if construed as intended to apply to those Courts only which have been established under the Constitution of the United States and by the Acts of Congress, over which the Federal Legislature can legitimately exercise control, and to which they can properly prescribe rules regulating the course of justice and the mode of administering justice. We are not disposed to give a broader interpretation to the statute. We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the Courts of the several States which shall be obligatory upon them."

Bumpass v. Taggert, 26 Ark., 398. Suit on unstamped note objected to on ground of non-compliance with the statute. "Since, then, the Act does not in terms prescribe such rules to State Courts, we must conclude that the provisions of the Act were only intended to apply to Federal Courts, for we cannot by implication hold that

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the intention of Congress was to invade the jurisdiction of the States in the administration of justice between their citizens.”

We are aware that a contrary view has been taken of this subject by other Courts and jurists of equal eminence to those mentioned. The leading case on that side is *Chartiers v. McNamara*, 72 Pa. Two of the five judges, Chief Justice Thompson and Mr. Justice Sharswood dissented from the majority, expressly basing their dissent on the ground that this legislation alters a rule of evidence belonging to the State Courts.

Without further citation of the cases we hold there was no error in the action of the trial Judge in overruling the exception to the admissibility of the deeds in evidence.

It results that the judgment in each case is affirmed.

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BAKER v. RAILROAD.

(Nashville. January 19, 1901.)

1. MASTER AND SERVANT. *Master not liable for injury to another's servant, when.*

Action against railroad company by servant of an ice company to recover for an injury sustained by a fall in icing a refrigerator car for and on the premises of the railroad company pursuant to contract between the two companies. The plaintiff avers that the railroad company failed and refused to place the car at a derrick erected by the ice company, the usual place for icing cars, and thereby necessitated the adoption of a more dangerous method of icing it, to wit, by climbing upon the car and pulling up the ice by hand, but fails to state that the railroad company was under any legal obligation to so place the car. He further avers that the car stood upon an uneven track that caused it to careen, but does not aver any improper construction of the track or the extent of its unevenness, or that it was out of repair. He further avers that the car, unknown to him, and, as it was dark, undiscoverable by him, was covered with snow and ice, carried from a distant point, but this danger was clearly open and apparent. *Held:* The railroad company is not liable, upon these averments, to the servant of the ice company for injury sustained in falling from the car while engaged in icing it. (*Post*, pp. 491-500.)

2. DECLARATION. *Amendment.*

An amended declaration can derive no aid from the averments contained in the original declaration and amendments thereto, when it purports to cover their entire scope, without embodying or adopting same, and makes additional averments. (*Post*, pp. 500-502.)

Cases cited: Railroad v. House, 104 Tenn., 110; State v. Lea, 1 Cold., 178.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. J. W. BONNER, J.

Baker v. Railroad.

WASHINGTON, ALLEN & RAINS for Baker.

SMITH & MADDIN for Terminal Co.

EAST & FOGG and CLAUDE WALLER and J. D. B. DeBow for Railroad.

McALISTER, J. Plaintiff brought this suit to recover damages for personal injuries. Demurrers were filed by each of the defendants, and were sustained by the Court, and leave granted to amend declaration. A voluntary nonsuit was taken as to Louisville & Nashville Railroad Company. Two amended counts were then filed. Demurrers to these amended counts were also sustained, and plaintiff's suit was dismissed. Plaintiff appealed and assigns as error the action of the Court on the demurrers.

The last amended declaration embraces all the features contained in the original and first amended declarations with additional allegations. It is therefore only necessary to consider that count, and the demurrers interposed thereto, to reach the real merits of the controversy and a correct judgment thereon. The amended declaration was, viz.:

"Defendants were common carriers, and shipped large amounts of fresh meats, requiring ice in their cars, which was placed therein by opening the top of the cars and letting down blocks of about one hundred pounds.

"The defendant had a contract with the ice

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company to do the work, and plaintiff had for a long time been employed by the ice company, and did this work for it in the yards of the railroad company.

"That in doing the work it was necessary for plaintiff to go on defendant's premises, and upon its tracks and cars, and it had been his custom to go on their premises and ice the cars at a derrick provided for that purpose. And with the derrick the work could be done in safety.

"At the time of the injuries defendants expressly invited plaintiff on their premises to ice a car, on February 25, 1900, and that defendant negligently failed and refused to place the car, which they had invited plaintiff to ice, at the derrick, but placed it on a curved track on an incline, which caused the car to careen.

"It was night, and the car had just gotten into the yards from the north.

"Plaintiff asked the defendants to place the car at the derrick, but defendants refused, and invited plaintiff to ice it at said remote point, saying it should be iced there and nowhere else.

"In icing it away from the derrick the ice had to be drawn up by hand, by rope and hooks, and plaintiff had to go on top of the car, and the work was accompanied by dangers which the use of the derrick would have obviated.

"It was accompanied by hidden dangers which

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were known to defendants and not known by plaintiff.

“By reason of the darkness plaintiff did not know the car was on a curve or incline, and did not know, or have any means of knowing, that the car brought with it upon the roof, from distant point, ice and snow, which made it extra hazardous to ice it by hand.

“The invitation of defendant to ice this car away from the derrick led the plaintiff to believe, and he did believe, the work could be done with safety, and that the place was safe, the defendants and their servants knowing that, by reason of the darkness, plaintiff could not, by the exercise of ordinary care, observe the dangers of the situation, and the dangers of icing said car by hand at that time and place.

“That on said date and place the defendant negligently failed to warn him of the fact that the car was on an incline, and was covered with ice and snow, and these facts not being open to observation, and while plaintiff was upon the car, and in the exercise of ordinary care, and by reason of the ice and snow on top of the car, and by reason of the car being careened on the curve, he slipped and fell upon and from the roof of the car to the ground,” etc.

This declaration does not set out any duty or contract on part of defendant to put the car to

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be iced at any particular place or at any derrick.

The demurrer of both defendants, in substance, is as follows:

1. The declaration shows that plaintiff was in the employ of the ice company, and was undertaking to fill a car with ice, by virtue of his contract of employment with the ice company, when he was injured.

The declaration fails to show that defendants, or their officers or agents, had any authority to direct plaintiff to go into any dangerous position, or that the plaintiff was under any contract of employment with defendants, by which there was any duty imposed on him to obey such orders, if any had been given him by it or its agents. The declaration simply alleges that this defendant requested plaintiff to ice a certain car when it arrived in Nashville, and when it arrived plaintiff requested defendant's servants to place the car at a derrick, which defendant refused to do, but placed it at a less convenient point, and that while he was undertaking to fill the cars with ice at the inconvenient place he was injured.

The declaration fails to show the violation of any legal duty which defendants owed plaintiff, and a violation of which caused the injury to him.

2. The declaration shows that plaintiff was not an employee of these defendants, but was an em-

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ployee of the ice company, and that in attempting to fill a certain car with ice he was acting as an employee of that company.

The only allegation of negligence is that the defendants failed to put the cars at a convenient place for icing them.

There was no duty imposed upon these defendants by the common or statutory law to place the cars at any particular place.

Any duty which was imposed upon them in this respect arose out of their legal contract with the ice company, and such duty, if it existed, was for the benefit of that company, for a breach of which that company would have had its action for damages for breach of contract.

3. The declaration shows that plaintiff voluntarily undertook to ice the car in the position in which it had been placed, without any orders from the defendant or its agents or officers having control or authority over him, and it therefore seems that in undertaking to do this work he assumed all the risks and dangers incident to its performance.

4. The declaration shows that the only danger incident to the performance of this work was that the snow and ice were upon the car, which was careened and steeper upon one side than upon the other, on account of which the plaintiff slipped and fell.

The declaration fails to show that there were

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any hidden or unseen dangers, or what they were if any, or that they caused or contributed to the injury, and does show that the dangers were as obvious to the plaintiff as to anyone else, and that it required no expert knowledge to detect them.

The plaintiff, in law, assumed all of the risks obvious to him when he undertook to put ice in this car while it was covered with snow and sleet and careened so as to make one side of the roof higher than the other.

A condensed statement of the case made in the declaration is that the Nashville Ice Company was under a contract with the defendants to ice their refrigerator cars. The plaintiff, Baker, who sustained the injuries, was an employee of the ice company, and not of the defendants. It had been customary to ice the cars at a derrick, by means of which the ice could be elevated to the top of the car and deposited therein. The car in question was not placed at the derrick, but was left on an inclined and curved track. The company's servants declined to station the car at the derrick. The plaintiff undertook to ice the car by stationing himself on top of the car and pulling the ice up by hand with the aid of ropes and hooks. It appears that the roof of the car was covered with ice and snow, and as the plaintiff attempted to pull the ice up, he

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slipped and fell from the car, sustaining very serious personal injuries.

The theory of plaintiff's counsel is that plaintiff was upon the defendants' premises for the purpose of transacting business upon an implied invitation, and that the injury was occasioned by reason of defects on defendants' premises. The rule invoked by counsel is thus stated by Mr. Wood in his work on Master and Servant, Sec. 337, viz.: "Although a contractee is not in general liable to the employees of the contractor for injuries resulting to them while engaged in his work under the contract of such contractors, yet if the work is done on his premises he is bound by the same legal obligation that exists, as between him and his immediate servants, to keep them in a suitable and safe condition, and is liable to any of the servants of such contractor for injuries resulting to them from defects therein, not under a contract obligation, but arising from the duty he owes to each of the employees arising out of his obligation to provide such appliances, and this duty extends to keeping the premises upon which the servants of the contractor are at work in a reasonably safe condition, whether the contract provides therefor or not." Mechem on Agency, Sec. 166, note, page 492.

Counsel for plaintiff especially rely upon the case of *Corghtry v. Glove Woolen Co.*, 56 N.

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Y. (S. C., 15 Am. Rep., 187). In that case it appeared that plaintiff's intestate was in the employ of some carpenters who contracted with defendants to put a cornice on their mill, and the defendants were to provide all scaffolds required for the purpose. The deceased, while engaged in the work, was killed by the fall of a scaffold built by the defendants for the use of the workmen. In an action to recover damages the plaintiff was nonsuited in the lower Court upon the ground that the defendant owed no duty to the deceased, but this was reversed by the Court of Appeals upon the ground that the scaffold being erected by the defendant upon his own premises for the express purpose of accommodating the workmen, a duty was thereby imposed upon the defendant to use proper diligence in constructing and maintaining the structure, and that this duty existed independently of the contract, and this is the rule applicable to every person who can be said to have come upon the master's premises by his invitation, and not in the character of a mere licensee, whether or not such person be a stranger to the owner. Mr. Wood, in commenting on this case, says that the rule must be understood as applying only in cases where the contractee owes a duty to the contractor's servants, and is limited to cases of defects in his premises. Applying the rule thus laid down to the facts of this case, it must be conceded that the plaintiff was upon the

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defendants' premises by an implied invitation, and not in the character of a mere licensee. But there was no breach of any duty which defendant owed the plaintiff as the servant of the ice company, an independent contractor. The company had not agreed to furnish any particular appliances or machinery for the accommodation of the workmen of the contractor in hoisting the ice into the top of the car, nor was the injury caused by any neglect in constructing and maintaining the appliances, like the insufficient scaffolding in *Corghtry v. Glove Woolen Co.* If, for instance, it had appeared in this case that defendants had agreed to furnish a derrick for the use of the contractor's servants in loading the ice into the car, and the injury to plaintiff had been caused by the falling of the derrick, owing to its insufficient construction, plaintiff's right of action would be sustained by the case cited of *Corghtry v. Glove Woolen Co.* But it does not appear from the face of the declaration that defendants had agreed to do anything for the benefit of the contractor's servants. Hence the sole inquiry is whether the premises of defendants, where the plaintiff was impliedly invited to work, were in a reasonably safe condition. In order to warrant a recovery under this rule, it must be alleged that the injury was caused by defects in the premises, and the facts constituting the particular defect complained of must be set out. It is alleged

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that the refrigerator car required to be iced in this case was stopped on a curved or inclined track, but it is not alleged that this track was out of repair or improperly constructed or otherwise defective, except that it was curved and inclined. The angle of inclination is not even stated, so that the Court can see that the track was dangerous. Plaintiff could not be heard to complain of the original construction of the track, since the company would have the right to build it in a manner best suited to its business.

The other allegation is that plaintiff did not know of the snow and ice being on said car, which defendants had negligently allowed to be there, and failed to warn plaintiff against the danger. This was a danger that was open and obvious to plaintiff the moment he climbed upon the car, and having assumed the risk of icing the car under such conditions, he cannot be heard now to complain. In addition to this, we are of opinion that snow and ice on the roof of a car is not such a defect in the premises as the law contemplates in fixing the rule of liability to one there by implied invitation.

Another ground of recovery alleged is that it was the duty of defendants to have all cars needing ice placed at the derrick to be iced, and that defendants were guilty of a breach of this duty. This allegation is made in the first amended declaration filed. The last amended dec-

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laration does not contain this allegation. In *State v. Lea*, 1 Cold., 178, the rule was stated to be that unless the second or other count expressly refers to the first, no defect therein will be aided by the preceding count, for though both counts are in the same declaration, yet they are as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former. Chitty's Pleading, Vol. 1, p. 356; 6 Bacon Ab., 188.

In *Railroad v. House*, 20 Pickle, 110, it was said: "The rule is the original complaint (or declaration) is superseded, and its effect as a pleading destroyed, by filing an amended declaration complete in itself, and which does not refer to, or adopt the original as a part of it."

The last amended declaration was complete in itself, and makes no reference to the allegation in the first amended declaration that it was the duty of the defendants to place the car at the derrick to be iced. But independently of this, the allegation was insufficient for the reason that it merely stated a conclusion of law. It did not allege how it became the duty of defendants to place the cars at the derrick. No such contract with plaintiff is alleged, nor is it stated that such a contract was made with the ice company by whom plaintiff was employed. At most it simply appears that it had been customary to

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place the cars at the derrick, but no duty or obligation, contractual or otherwise, is shown, so that this allegation is not material. Moreover, it is not shown that the failure of defendants to place the car at the derrick was the proximate cause of the accident.

Affirmed.

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*STATE v. GILBREATH.

(Nashville. January 26, 1901.)

1. MURDER. *Facts that support verdict for murder in first degree.*

The facts set out in the Court's opinion are held sufficient to support a verdict for murder in first degree, with death sentence, and to negative the defense of accidental killing of a wife by her husband. (*Post*, pp. 503-508.)

2. NEW TRIAL. *Affidavits for insufficient, when.*

Affidavits afford no ground for new trial, which disclose only matter that would be clearly prejudicial to the applicant on another trial. (*Post*, pp. 508-510.)

FROM LINCOLN.

Appeal in error from Circuit Court of Lincoln County. M. D. SMALLMAN, J.

W. L. ACUFF and J. W. HOLMAN for Gilbreath.

Attorney-general PICKLE for State.

WILKES, J. Defendant is convicted of murder in the first degree for killing his wife, and sentenced to death, and has appealed. The kill-

*The Governor commuted the death sentence to imprisonment for life.—
REPORTER.

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ing was with a shotgun, and at a church supper, in the presence of a large crowd of negroes, and is not denied. The only defense on the merits is that the killing was accidental, and not intentional. Quite a number of persons were examined who were eyewitnesses of the occurrence, and there is but little conflict in their testimony. It appears that the defendant was under the impression that too intimate relations existed between his wife and one George Johnson, and he was watching them closely. All the parties, Johnson, the defendant and his wife, were present at this church supper. The defendant had his gun with him, and says he was carrying it home from his mother's; that he stopped by the church and set the gun over in a graveyard inclosure outside of the church, and went in, and according to his version saw George promenading around the church with something concealed in his hand which he was shaking at defendant's wife; that while he was looking at George he saw him give defendant's wife some money, which he took to be a quarter. He then went out of the house, got his gun, cocked both barrels, and re-entered the church, holding the gun with the butt under his overcoat, the barrels pointing towards the floor. He immediately thereafter shot George Johnson, who, it appears, was standing at a table talking with Lou Clark, the sister of defendant's wife. The details of this killing do not appear in this

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record. The church was crowded, and a stampede for the doors followed immediately on the first shot. The defendant says he tried to escape through the door, but the way was crowded and jammed, and in order to get along he had to dodge and turn his gun from side to side to get by those in his way. He was still carrying it by his side, with the butt under his overcoat, when about the middle of the church some one pointed a pistol at him and fired, the bullet grazing his nose and glancing off his cheek, making a flesh wound. The shock of the bullet striking him caused him to grip his gun, and he felt it jump in his hands, but did not know that any one was shot.

The great weight of evidence is that the pistol shot was after both the other shots. He pressed through the door, and after he got outside he heard some one say that Ella, his wife, was shot. He turned to go back in the house, but some one pointed a pistol in his face, and the door was shut. Defendant says he never saw his wife after he fired the shot at Johnson, and that he was all the while dodging from side to side trying to get out.

This is the substance of his statement. One witness, Bud Briggs, colored, corroborates him in the statement that he turned his gun from side to side when it would strike any one in his way. This witness states that defendant was run-

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ning straight towards the door when the gun fired, and did not stop or turn aside; that his face was toward the door, and he did not look at his gun nor at his wife, though she was in front of him, and that the gun was kept at his side and not raised.

There was testimony of several witnesses to the effect that this witness, Briggs, said before the trial that defendant ran through the church after his wife with his gun pointed at her.

Quite a number of witnesses were examined for the State, and virtually agree in their statements that after George Johnson was shot, Ella, defendant's wife, started to run, and defendant started after her and turned his gun toward her; that he kept his gun pointed toward her all the time, and as she went around the crowd defendant turned the gun after her; that she cried out as she ran that she had not done anything, and was not talking to him.

The testimony is uncontradicted that the defendant did not put his gun to his shoulder to take aim, but held it in the direction of his wife, and with the butt under his overcoat and about level with his waist.

This is the testimony, in substance, of six (6) witnesses. Witness Lou Clark adds that defendant waited till no one was in the way before he shot his wife; that she turned from the door because she could not get out, and just at that

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time she was shot. The woman was shot in the thigh, and died in a short while. Witness George Wright is still more specific, and says that the woman turned from the door and ran towards the northeast corner where he was, and the defendant followed her; that she ran in front of him, and took him by the strap of his suspenders and said, "Don't let him kill me!" that defendant started around him, and she then ran behind him, and defendant thereupon stepped back a step so he could get around him, and fired, and that he could not have shot her before on account of the crowd. This witness adds that defendant kept pointing his gun at her as she ran around the crowd toward the door, and when he was between them defendant stepped back so he could shoot her and not hit the witness. On cross-examination this witness gives some confused and inconsistent statements, but in the main reiterates his original statement. He is not corroborated in his statements about the woman running around him and calling on him to protect her, and we can give but little credit to this testimony except so far as corroborated by other witnesses.

The witness, John Harris, states, however, that the defendant kept the gun pointed at her until no one was in the way, and then shot her, and he was holding the gun at the time at arms' length, but does not know whether he was look-

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ing at it or not. Nearly all the witnesses state that the woman was shot after she turned from the door and was running up the side of the room.

There was testimony showing that the defendant was very jealous of his wife; that he had mistreated her, and that he had abused her, and been arrested for it, and he had said he would kill her but hated to do so, as she was pregnant. He was morbidly jealous of her, and perhaps not without some grounds.

We have not been able to find any errors in the charge of the Court, and none have been pointed out.

The defendant, as well as several other witnesses, makes affidavits on a motion for a new trial, and it is principally on matters set up in these that a new trial is asked. It appears from the affidavits, and otherwise, that the defendant had two indictments pending against him for murder at the same time. One for killing George Johnson and one for killing his, defendant's, wife. The defendant is a negro, and was not able to employ an attorney to defend him. The Court appointed two young attorneys of the Fayetteville bar to represent him. This was done about ten o'clock in the morning. After consulting with the defendant, at his request they announced ready for trial. While the preliminaries of the trial were being arranged the question was raised which

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case would be first tried. The Court announced that the case involving the killing of the wife would be first tried. Counsel for the defense then stated that they had supposed the case for killing of Johnson would be first tried, and they had prepared for that, and announced ready in that, but had not conferred about the other, and were not ready in that, and had made no preparations in that case. The Court, however, required the trial to proceed for the killing of the wife. The affidavits which are introduced on the motion for a new trial to show what other evidence could be introduced on a second trial are not important or beneficial to the defendant; indeed, they are, with one or two exceptions, prejudicial to him, as they set out differences between defendant and his wife, and illustrate his jealousy, and thus show a motive for the killing, and support the theory that the killing was not accidental, but designed. A part of the testimony of one witness, Rawlston, might have been beneficial to the defendant, as tending to show that he loved his wife and treated her well, but the great weight of the testimony on the trial was to the contrary. It appears that this witness, Rawlston, was present at the consultation between defendant and his counsel before going into trial, and his testimony could and should have been given on the original hearing. Indeed, it appears that a witness in the record called Jim Rawlston,

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was examined, and testified substantially as appears in the affidavit. This same witness, however, in his affidavit states damaging facts to the effect that the defendant's wife had attempted to poison him with glass beat up and put in bread. Other affidavits tended to show that improper relations existed between the defendant's wife and George Johnson. This could not benefit defendant on the trial of this case. The testimony of Matt Hughes alone would have been of advantage to defendant on a new trial. We are unable to find any reversible error in this record, and can see no good that can result to defendant from a new trial. The facts are few and simple, and the affidavits for a new trial do not show that any other and further defense can be made than has been made. We are therefore constrained to affirm the judgment of the Court below, and it is the judgment of the law and sentence of this Court that the defendant, John Gilbreath, be delivered to the Sheriff of Davidson County, to be by him safely kept and delivered to the Sheriff of Lincoln County, and by him kept until Wednesday, March 20, 1901, when within legal hours, and in the manner prescribed by law, he will be hanged by the neck until he is dead.

DISSENTING OPINION.

WILKES, J. Upon the record as presented to

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this Court I think the judgment is warranted. I am, however, of opinion that defendant's counsel were forced to go to trial without consultation with their client or their witnesses, and without that deliberation that should characterize a trial involving the life of a citizen. Counsel were young and inexperienced, and had prepared themselves upon one case and were required to go to trial upon the other. The testimony and defenses in the two cases might have been, and probably were, very different, even though the offenses were committed so near to each other in point of time. Defendant's version of the killing that it was accidental, was at least plausible, and made out by testimony was sufficient to reduce the crime to a lower grade of homicide than murder in the first degree, but his defense was not developed along the line of accidental killing, but along lines that would have been applicable to a defense of the other indictment in killing Johnson. It is evident that counsel had considered the case in this view and along this line appropriate to the defense for the killing of George Johnson, but not to a defense for the killing of defendant's wife. It is evident that defendant was insanely jealous of his wife, and had some ground therefor. He thought, no doubt, that he was upholding the sanctity of his marriage relation.

For these reasons, and because the proof does not, in my opinion, exclude the idea of acci-

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dental killing beyond a reasonable doubt, and believing the case should be more fully developed along this line, I prefer that defendant be given another trial, and hence respectfully dissent from the view of the majority.

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INSURANCE Co. v. HANCOCK.

(*Nashville*. February 2, 1901.)

1. **INSURANCE, FIRE.** *Waiver of limitation upon bringing action for loss.*

By making an absolute denial of liability a fire insurance company waives the provision of its policy allowing it sixty days after proofs of loss are made in which to pay the loss without suit. (*Post*, pp. 515, 516.)

Case cited: *Insurance Co. v. Thornton*, 97 Tenn., 1.

2. **SAME.** *Waiver of condition as to ownership of insured property.*

A condition that avoids a fire policy if the assured's interest in the insured property is other than that represented in his application, is not available to defeat the insurer's liability in an action on the policy where the assured answered correctly as to his interest in the property, but the agent of the company wrote his answer incorrectly and obtained his signature to the application without his knowledge of the incorrectness of his answer; and the truth of the matter may be shown by parol evidence contradicting the written application. (*Post*, pp. 516-518.)

Case cited: *Insurance Co. v. Sorrels*, 1 Bax., 352.

3. **SAME.** *Sufficient compliance with condition as to occupancy of insured property.*

It is a sufficient compliance with the condition in a fire policy that the insured premises shall not become vacant, that a tenant of the owner lived with his family in a small house in the yard only thirty-six feet distant from the insured premises, and slept in one room of the insured premises, although he did not have access to the other rooms, especially where the assured informed the company's agent, at the time of effecting the insurance, that he expected to be absent with his family from the insured premises, leaving a person to sleep in the house, and this was assented to by the agent with an intima-

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tion that it would suffice if some one lived in the yard. (*Post*, pp. 518-522.)

Case cited and distinguished, *Insurance Co. v. Ridge*, 9 Lea, 507.

FROM RUTHERFORD.

Appeal in error from Circuit Court of Rutherford County. W. C. Houston, J.

B. L. RIDLEY for Home Insurance Co.

RICHARDSON & RICHARDSON for Hancock.

McALISTER, J. This is an action on a policy of fire insurance. Verdict and judgment below were in favor of plaintiff for \$1,908.75. The company appealed and has assigned errors.

It appears from the record that this policy was issued and delivered to the plaintiff on November 28, 1899, and insured a country dwelling house in Rutherford County, including the household furniture. On March 24, 1900, this property was destroyed by fire.

The conditions of the policy material to the present investigation are, first, that the insured is the sole and unconditional owner in fee of said property; second, that the premises shall be continually occupied, and if they shall become vacant, unoccupied, or uninhabited, then the policy

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shall be null and void. The policy also provides that payment shall be made in sixty days after receipt of proofs of loss. It appears proofs of loss were duly made by the assured, which were received by the company on April 30, 1900, and the present suit was commenced on June 13, 1900, less than sixty days after receipt by the company of the proofs of loss.

The prematurity of the suit was pleaded in abatement, but the plea was overruled. The company then pleaded, first, that the title of the property was not a fee simple title in the assured at the time he applied for the insurance, nor at any subsequent time; second, that the premises were vacant, unoccupied, and uninhabited at the time of the fire without the knowledge and consent of the company. The trial resulted, as already stated, in a judgment in favor of the plaintiff.

The first assignment of error is that the Court erred in overruling defendant's plea in abatement as to prematurity of the suit.

We think a conclusive answer to this assignment of error is found in the fact that defendant company, on receipt of proofs of loss, wrote a letter to the insured in which it denied any liability for the loss, upon the ground that the possession, occupancy, and use of the property at the time of the fire was not as stated in the

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policy or application. This was an unconditional denial of liability.

The law is that denial of liability is a waiver of the time limit clause in the policy, and hence plea of prematurity of suit cannot be successfully interposed. Says Mr. Biddle in his work on Insurance, Sec. 1145, viz.: "There is usually in the policy an agreement that the insurer shall not pay the loss till the expiration of a certain period, as sixty days, from the loss or receipt of proofs, which may be waived. When the insurer declines to pay at all, it has been held that the insured may sue from the date of refusal, as this waives the above clause." Citing Sec. 1141, note 9.

In *German Ins. Co. v. Gibson*, 14 S. W. Rep., 672, the Court said, in speaking of this clause: "It would be unreasonable to say that it (the company) still retained the right to have the ninety days in which to pay a loss that it never intended to pay. The object of the agreement that the company should have the ninety days was to give it time to pay after the loss was adjusted. Why should it have the time when it never intended to pay? The denial of liability was inconsistent with such a clause, and was a waiver of it." See, also, *Insurance Co. v. Thornton*, 97 Tenn., 1.

The next assignment of error is that there is no evidence to support the verdict. This assign-

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ment is based upon the ground that the policy had become void and the insurance forfeited for two reasons, namely: First, because plaintiff made a false statement in his application for insurance, which statement became a part of the policy, and was warranted to be true, wherein he claimed to be the owner in fee simple of the premises, when as a matter of fact he was not such owner. Second, because the property was vacant, unoccupied, or uninhabited at the time the same was destroyed by fire.

We shall first consider the representation in respect of the title. On this subject we find evidence in the record tending to show that the answers to the questions propounded to the assured in the application were written down by the agent of the defendant company. In answer to the question, "What title has applicant to these premises?" the insured is made to answer, "Fee simple." The insured testified that he did not know the meaning of the words fee simple title, and made no such statement to the agent. He further testified that just as he was about to sign the application the agent asked applicant if the title to the property was in him. He replied, "No, sir; I had the deed made to me and my wife during our lifetime, and to what children she had by me." This deed, moreover, was registered, and the registration books were easily accessible. So that it appears from plaintiff's evi-

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dence, which must be held to have been accented by the jury, that the company was fully advised through its authorized agent, before the application was signed, of the true state of the title, and that the erroneous statement in the application that plaintiff was the owner in fee simple of the premises was the mistake of the agent, which cannot be visited upon the assured.

In *Insurance Co. v. Sorrels*, 1 Bax., 352, it was held by this Court that when the agent makes out the application for insurance and inserts in it representations that are untrue, though the facts were correctly stated to him by the assured, who signs the application, this will not prejudice the insured's rights or invalidate the policy, and parol testimony may be heard to show that the answers were thus written by the agent. Citing *Union Mutual Ins. Co. v. Wilkinson*, 13 Wallace, 322.

"Where the applicant states fully and truthfully the circumstances relating to the title and ownership of the property insured, and the agent, knowing all the facts, states the title incorrectly and issues the policy, the company cannot take advantage." Joyce, Secs. 472-476, and citations.

The other ground insisted upon for a forfeiture of the insurance is that the premises at the time of the fire were "vacant, unoccupied, and uninhabited," in violation of the conditions of the policy. An able and elaborate argument has been

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submitted in support of this contention. The authorities uniformly uphold the importance and validity of the occupancy clause in insurance policies.

In *Insurance Co. v. Ridge*, 9 Lea, 507, the policy provided that if the within mentioned premises shall become vacant or unoccupied, without the consent of the company indorsed on the policy, the policy shall be void. It appeared that the fire occurred while the premises were temporarily vacant, and it was held this fact avoided the policy, and the insured could not recover. What, then, are the facts presented in this record for the application of this principle? The proof shows that the insured, when he applied for the insurance, told the agent that he and his family would not be in that house all the time, whereupon the agent asked him if there would be some one in the yard, and he (insured) told him there would be a man in the house, and the agent replied that would be all right. We think it obvious, from this statement, that the agent would have been satisfied to have an occupant of the tenant's room in the yard, and did not intend to demand that some one should actually reside in the house. However, the proof is that plaintiff and his family moved out of the house and went to Wilson County, where he cultivated a farm. He left a tenant, or cropper, in charge of the farm in Rutherford County,

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but would return "sometimes twice a week, sometimes once a week, and sometimes he would miss a week." All of the furniture and household goods, excepting two or three articles, remained in the building.

The proof is that at the time of the insurance there were two small rooms in the yard, situated about thirty-six feet from the dwelling house. These rooms were occupied by a tenant and his family. About the twentieth of December, before the fire occurred, this tenant commenced to sleep in one of the rooms of the dwelling house. On the night the fire occurred, to wit, March 24, 1900, this tenant, his wife, and a visitor were sitting in the tenant's house. The fire occurred about twenty-five minutes to eleven o'clock, and when first discovered it was on top of the house at the east side. The proof shows that no one had been in the dwelling house for a week. The tenant had access to one room only, and no keys to any other part of the house.

The question then presented upon these facts is whether the insured dwelling house was unoccupied in such a sense as to avoid the policy. We think not. In the first place the agent who took the application was informed that insured expected to leave the premises. This agent inquired if there would be some one in the yard, thereby intimating that this would be sufficient. But the

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insured stated there would be a man in the house. To this arrangement the agent assented, saying all right. Now the proof shows that from December 20 the tenant had been sleeping in one of the rooms of this dwelling, and that on the night of the fire he was sitting in the tenant's room, only thirty feet away. The object of having some one on the premises is to keep out trespassers, prevent incendiarism, as well as to maintain supervision over the property. The proof is clear that no one had entered these premises, nor is there a suggestion that the fire was of incendiary origin. It could have arisen from spontaneous combustion, or possibly the ignition of matches by rats or mice. But it is insisted that this tenant, having no keys or access to the other rooms, was powerless to reach the fire when discovered. No authority has been furnished where this exact point has been decided.

In *Moody v. Amazon Ins. Co.*, 52 Ohio St., 12, it was said, viz.: "Nor does it follow that as a matter of law a dwelling house is to be considered as unoccupied because it has ceased to be used as a family residence, when the household goods remain ready for use, and it continues to be occupied by one or more members of the family, who have access to the entire building for the purpose of caring for it, and who do care for it, and make some use of it as a place of abode."

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So in *Imperial Ins. Co. v. Kierman*, 83 Ky., 470, the Court said, viz.: "When the tenant moved the appellee failing to obtain another tenant immediately, got a man to stay in one room of the house, which was furnished for the purpose, and who ate and slept there, having access to the entire building for the purpose of caring for and watching it, and who was so doing when it was destroyed."

It will be observed that while the exact point is not raised or decided, both cases lay stress upon the fact that the custodian of the house had access to the entire building. We can well see how this arrangement might promote the interest of both parties in the protection of the premises. Yet, as a practical matter, we are not prepared to hold that a man who has left an occupant of a single room to watch his house must leave with him the keys to his entire premises. This is frequently impracticable and undesirable, and such a rule would result in much injustice to policy holders. In the present case all that was contemplated between the parties was that some one should sleep in this dwelling house and maintain a watch over the premises. There was a reasonable compliance on the part of the insured with this understanding, and the judgment must be affirmed.

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MARTIN v. INSURANCE Co.*(Nashville. February 2, 1901.)***1. INSURANCE, FIRE. *Authority of broker.***

The fact that an insurance broker was employed by the insured to procure a policy does not, without more, invest him with implied authority to accept or receive notice of its revocation, or to assent to its cancellation or to its substitution by the policy of another company. An agent to procure a contract has no power to discharge it implied from the original authority merely.

2. SAME. *No release from liability.*

An insurance company is not released from liability for a loss occurring after an attempted revocation of its policy and substitution of the policy of another company, where notice of the revocation was not given to the assured, but to the broker who had been employed by him for the sole purpose of procuring the policy, and the broker, without express authority from the assured, assented to the revocation and proceeded to procure and substitute a policy in another company, to which arrangement the assured never assented. And the company issuing the substituted policy is not liable thereon in such case.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. Cook, Ch.

EDWARD H. EAST for Martin.

GRANBERY & MARKS for Palatine Ins. Co.

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R. W. BARGER and JOHN J. VERTREES for
Hartford Ins. Co.

McALISTER, J. This record presents a controversy between two fire insurance companies as to which shall be onerated with a loss. The complainant has sued both companies. The Palatine Company issued the first policy, but it is contended that policy was canceled upon notice, and a new policy substituted in the Hartford Company. The Chancellor and the Court of Chancery Appeals concurred in adjudging liability against the Palatine Company, and in exonerating the Hartford Company. The Palatine Company appealed, and has assigned errors.

The facts found by the Court of Chancery Appeals are substantially these: In December, 1897, P. Bernstein, of Nashville, was the owner of a stock of merchandise in the city of Jackson, Tenn. His son, C. Bernstein, was placed in charge of this store as manager. It appears that P. Bernstein insured this stock of goods at Jackson, and carried the policies with him to Nashville, where he resided. Desiring additional insurance, he directed his son, at Jackson, to take out another policy for \$2,000. The son accordingly applied to Fisher & Wilkerson, agents, stating that he preferred a policy either in the Hartford or Aetna Insurance companies. The agents informed him these companies had as much insurance in that

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block as they desired, but they would procure a policy for him in the Palatine Insurance Company. This insurance was placed through another agent, and the policy was to run for twelve months. Wilkerson & Fisher delivered this policy to C. Bernstein, and collected the premium for one year, with the understanding that they would divide commissions with the agent of the Palatine Insurance Company in accordance with the usual custom in such cases. This policy was forwarded by C. Bernstein to his father at Nashville.

P. Bernstein, the father, died on December 26, 1897, and on December 31 N. Martin, of Nashville, qualified as administrator of his estate. It appears that on December 30 the agent of the Palatine Insurance Company notified Wilkerson & Fisher that the manager of the Palatine Company desired to take up the policy that it had issued on this stock. They replied, "All right; consider it canceled, and we will substitute for it our policy in the Hartford." At that time nothing was said about returning the premium. On January 1, 1898, Wilkerson & Fisher, without the request of any one representing the assured, wrote a policy in the Hartford Insurance Company for \$2,000, payable to the estate of P. Bernstein, deceased, for one year from January 1, 1898. This policy was handed to Clarence Bernstein, and by the latter given to N. Martin, administrator of Philip

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Bernstein, deceased. The administrator received the policy on January 7, and up to that time he had no knowledge of any change in the policies made by the agents.

When the Hartford policy was delivered to C. Bernstein he was informed that the Palatine policy had been canceled. C. Bernstein afterwards promised to have the Palatine policy sent back to the agent. He stated, however, that he did not agree to the cancellation of the Palatine policy. On the night of January 4, 1898, a fire occurred which destroyed a portion of the stock covered by the insurance. The Palatine policy had never been surrendered by the administrator, but was still in his possession. The administrator inquired of Wilkerson & Fisher, and of the agent of the Palatine, which of the two policies was in force, and offered to surrender the one that had been annulled, but they declined to pass upon the question, or to accept a surrender of either policy.

The administrator made proofs of loss to both companies. The amount of the loss sustained by the fire was \$649.42. This amount is not disputed, but which of the two companies is liable for the loss presents the real controversy. In the contract of insurance is this clause, to wit: "This policy shall be canceled at any time, at the request of the insured or by the company, by giving five days' notice of such cancellation. If

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this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate. Except when this policy is canceled by this company by giving notice, it shall return only the *pro rata* premium."

The Court of Chancery Appeals find as a fact that the only notice of the cancellation of the Palatine policy was given to Wilkerson & Fisher; that they were not agents of the insured, and that notice to them was insufficient under the terms of the policy. It is very obvious upon the facts found that Wilkerson & Fisher were merely insurance brokers; their only connection with the case was in negotiating insurance through the agent of the Palatine Insurance Company. When this policy was written and accepted by the insured, Wilkerson & Fisher had no further connection with the case.

It appears that when the Hartford policy was issued Bernstein was dead, and the insurance was made payable to his estate. It is shown that Martin, administrator, neither agreed to the cancellation of the Palatine policy nor applied for the Hartford policy. So it is plain that the alleged cancellation of the old policy and the substitution of the new one was an arrangement

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entered into between persons who had no authority to act in the premises.

In *Kerman v. Insurance Co.*, 100 N. Y., 411, it was said, viz.: "But the authority of a broker employed to procure insurance for his principal, such broker not being a general agent to place and manage insurance on his principal's property, terminates with the procurement of the policy. It cannot in reason be held to continue after the insurance has been procured and the policy has been delivered to the principal. An agent to procure a contract has no power to discharge it implied from the original authority merely. If he possesses that power it arises from some actual or apparent authority superadded to the mere power to enter into the contract." *Grace v. Am. Central Ins. Co.*, 109 U. S., 278; *Adams v. Fire Ins. Co.*, 17 Fed. Rep., 630; *Kehler v. N. O. Ins. Co.*, 23 Fed., 709; *Wright v. Royal Ins. Co.*, 53 Fed. Rep., 340; *Ostrander Fire Ins. Cos.*, Sec. 16; 1 Joyce on Ins., Secs. 636, 637; 2 Joyce on Ins., Secs. 1655-1666; *White v. Ins. Co.*, 120 Mass., 330; *Mechem on Agency*, Sec. 931.

It results that there was, as matter of law, no cancellation of the policy issued by the Palatine Insurance Company, nor substitution of the Hartford policy, and without discussing other questions, which are perhaps equally as conclusive, we affirm the decree.

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(Nashville. February 2, 1901.)

INSURANCE, FIRE. *Policy rendered void by double insurance.*

A fire policy, taken out by the assured's agent, containing this clause, viz.: "This entire policy, unless otherwise provided by agreement indorsed hereon, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," is rendered void by the act of the assured in taking out a subsequent policy on the same property, although he did it without knowledge of his agent's act, where his want of knowledge is imputable to his own negligence.

Case cited: *Somerfield v. State Ins. Co.*, 8 Lea, 547.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. COOK, Ch.

W. D. COVINGTON for Arnold.

C. C. SLAUGHTER for Insurance Co.

McALISTER, J. This is a suit upon a policy of fire insurance. The Chancellor and the Court of Chancery Appeals concurred in adjudging the policy noncollectible upon the ground of double insurance. The complainant has again appealed.

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The policy contained this clause, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The case was decided on demurrer. The bill alleged that complainant was the owner of certain household goods and furniture; that he spoke to a friend about having them insured, and that on the eleventh of October this friend took out a policy for him in defendant company. Complainant, however, alleges that his friend had failed to inform him that he had procured this insurance, and that in ignorance of this fact, complainant, on November 1, 1899, nineteen days thereafter, also procured a policy on the same goods in the Williamsburg Fire Insurance Company. It is further shown that on the night of November 27, 1899, this property was destroyed by fire; that on the morning after the fire agents representing both companies called to adjust the loss, and then it was for the first time that complainant learned that his friend had taken out a policy for him. Complainant undertook to explain to the agents how this double insurance happened, but both disclaimed any liability, and repudiated the policies. Complainant alleges in his bill that the double insurance was unintentional and an innocent mistake; that complainant did

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not see his friend from the time he agreed to procure a policy for him until after the fire, nor did he know the first policy had been issued; that not hearing from his friend, and in ignorance of the issuance of the first policy, and believing that his property had not been insured, complainant took out a policy on November 1, 1899. The present suit is upon the policy taken out by the agent.

It will be observed from the allegations of the bill, which of course are admitted to be true on demurrer, complainant neglected from October 11, 1899, to November 27, 1899, to take any steps to ascertain from the agent whether he had procured a policy for him as he had directed, but that in the meantime he undertook to insure the property himself.

The position assumed by complainant is that inasmuch as he did not have actual knowledge of the existence of the prior policy when he took out the second, he therefore did so innocently, and did not thereby forfeit the first policy. But we think the complainant failed to exercise any diligence in ascertaining whether his agent had procured the policy. He had directed his agent to insure the property, and without hearing from him or taking any steps to learn, he undertook to insure the property himself. It is shown from the bill that complainant neglected from October 11 to November 27, when the fire occurred, to

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see his agent or communicate with him. It is not charged that the additional insurance was effected with the knowledge or consent of the defendant company.

The law is well settled that additional insurance in violation of the terms of the contract will avoid the policy. *Summerfield v. State Ins. Co.*, 8 Lea, 547; *Sugg v. Hartford Ins. Co.*, 98 N. C., 143; *Phoenix Ins. Co. v. Copeland*, 86 Ala., 551; 13 Am. & Eng. Enc. Law (2d Ed.), 300; 3 Joyce on Insurance, Secs. 2457, 2458; *Couch v. City Fire Ins. Co.*, 38 Conn., 185; 115 N. Y., 279 (S. C., 12 Am. St. Rep., 101); May on Insurance, Sec. 364; Ostrander on Insurance, Sec. 244.

Complainant has ratified the act of his agent by bringing suit on the policy procured by him, and is of course bound by all the terms of the policy, as though he had taken it out himself. Joyce on Insurance, Sec. 4567.

Affirmed.

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WILLIAMS v. NASHVILLE.

(Nashville. February 2, 1901.)

MUNICIPAL CORPORATIONS. *Liability for injury from rock quarry.*

A municipal corporation that maintains a rock quarry within its limits is not liable for an injury sustained by a person who falls into an excavation therein made in removing stone, and situated away from the streets, while he, without invitation, express or implied, is passing, by mere license, through the quarry, as a more convenient and expeditious way of reaching home than by following the public streets.

Cases cited and distinguished: Niblitt v. Nashville, 12 Heis., 684; Whirley v. Whitman, 1 Head, 610; Clapp v. Lagrill, 103 Tenn., 164.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. JNO. W. CHILDRESS, J.

PITTS & MEEKS and H. C. LASSING for Williams.

E. A. PRICE and K. P. McCONNICO for Nashville.

BEARD, J. This is an action to recover damages for personal injuries sustained, as is alleged, from the negligence of the defendant. The case

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was disposed of on demurrer. The declaration averred that the city of Nashville, at the time of the injury was, and for many years prior thereto had been, the owner of a tract of land contiguous to a public street in the populous part of the city, which it had used as a rock quarry, upon and from which it had quarried, and under contracts with others, had caused to be quarried a large amount of stone, in the course of which employment, deep and dangerous excavations were made abutting upon and near to a public street and certain roadways and passageways which are through and across this land, and over which it knew the citizens of Nashville were accustomed to pass, which excavations the city permitted to remain unfenced, unguarded, and without signals or warnings of any kind. It is further averred that plaintiff, while returning at night from the central part of the city to his home, located beyond the premises in question, and being ignorant of the dangerous excavations, in "attempting to cross the premises along a pathway thereon leading towards his home from the point" where he had disembarked from a car on the public street nearest his home, without fault or negligence on his part, fell into one of these excavations and received personal injuries, for which he sued.

One of the grounds of the demurrer sustained by the Court below, in substance, is that upon the facts averred the plaintiff was using the path-

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way in question for his own convenience, without invitation from the defendant, and in doing so took the risk of the injury from these excavations.

It will be observed that the case made in the declaration is not that of a party, who while using ordinary care is injured by accidentally falling into an excavation made by the owner on his own land, but so near to a highway as to render it unsafe to one passing over it, as in *Barnes v. Ward*, 9 C. B., 392; *Norwich v. Breed*, 30 Conn., 535; *Niblitt v. Nashville*, 12 Heis., 684. Nor does it involve the rule of law upon which the proprietor is held liable for an injury resulting from the use of dangerous but alluring and unguarded machinery erected by him on his own land, sustained by one unable to judge of the danger of a careless use of it, as in *Sioux City Railroad v. Stout*, 17 Wall., 657, and *Whirley v. Whitman*, 1 Head, 610. But it is rather that of one who leaving a public street voluntarily, for his own convenience, undertakes to cross the land of defendant, excavated by it and by those authorized by it to do so, for a legitimate purpose, by a way which with the acquiescence of, but without invitation from the defendant many persons had used, and in thus passing over it accidentally falls into one of the excavations, being seriously injured, seeks to recover damages for such injury.

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While it is true that when the owner, expressly or by implication, invites a person to come upon his land, he will be liable to such person, who, while exercising ordinary care, receives an injury from any snare or pitfall existing thereon by the owner's contrivance or consent. On the other hand, it is equally true that a bare licensee takes the risk of accidents in using the premises in the condition in which they are. *Beck v. Carter*, 68 N. Y., 282 (S. C., 23 Am. Rep., 175).

In the discriminating opinion delivered in that case two English cases are referred to which admirably illustrate the distinction indicated above, to wit, *Corley v. Hill*, 4 C. B. (N. S.), 556, and *Hounsell v. Smyth*, 7 *Id.*, 731. We adopt the statement of these two cases from the body of that opinion. In *Corley v. Hill* the owner of land upon which was a private road leading to an asylum on his premises, for the use of persons going there, gave permission to a third person to place materials on the road. The servant of the plaintiff, in the night time, while driving his master's horse over this road on his way to the asylum, and using due care, ran upon and against the materials placed in the way by the defendant's permission, and the horse was injured. The defendant was held to be liable. Cockburn, C. J., said: "The proprietors held out an allurement whereby the plaintiff was induced to come upon the place in question; they held

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out this road to all persons having occasion to proceed to the asylum, as the means of access thereto. Could they have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not."

In *Hounsell v. Smyth* the defendant was seized of certain waste land, upon which was an uninclosed quarry near and between two public highways, and the declaration averred that all persons having occasion to pass over the waste land had been accustomed to go across the same with license and permission of the owners, and that the plaintiff having in the night time taken the wrong road, was crossing the waste for the purpose of getting to the other, and not being aware of the existence or locality of the quarry, and being unable, by reason of the darkness, to see it, fell in and was injured. It was held that the declaration disclosed no cause of action. The Court said: "No right is alleged; it is merely stated that the owner allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint; that they were not churlish enough to interfere with any person who went there. He must take the permission with its concomitant conditions and, it may be, perils."

The distinction between these two cases and the classes which they respectively represent, is that in the one the owner had imposed upon

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himself by his invitation to the public to use his private way for the purpose for which it was constructed, the duty of exercising ordinary diligence to see that no unnecessary peril came to one accepting such invitation, while in the other the owner assumed no such duty towards those who availed themselves of a mere acquiescence on his part of their use of such a way. For the theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff. So where such duty does not exist, however unfortunate the injured may be, and free from negligence, yet he must alone bear the consequences; he cannot impose them upon one under no obligation in law towards him, save not to inflict, directly or indirectly, wanton injury upon him.

From the declaration in the present case it is apparent the plaintiff was a stranger to the defendant. He was on the land of the latter without an invitation of any kind, and for his own convenience, and while it does appear that the way which he was using was also used at its pleasure by the public, this was only done by the passive acquiescence of the defendant. In such case it is well settled by adjudications in England and America that the party injured under such circumstances is a mere licensee, and he must bear the consequences of his own misfortune.

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Cusick v. Adams, 115 N. Y., 55; 12 A. S. R., 772.

This distinguishing principle was recognized in *Clapp v. Lagrill*, 103 Tenn., 164, where will be found a full citation of cases.

The judgment of the Circuit Court is affirmed.

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MARKS & CO. v. BRIDGES & SON.

(*Nashville*. February 16, 1901.)

1. WAREHOUSE RECEIPT. *What is not.*

A receipt signed jointly by the proprietor of a bonded warehouse and the government storekeeper and issued to the purchaser of whiskey on storage in the warehouse and providing for delivery of same upon return and surrender of the receipt, properly indorsed, and payment of government tax and storage charges, is not a technical warehouse receipt within the meaning of the statute on that subject and does not possess the attributes conferred by the statute, although it recites that it "is given in deference to the Tennessee warehouse laws."

Act construed : Acts 1879, Ch. 236.

Code construed : §§ 3601-3605 (S.); §§ 2792-2796 (M. & V.).

Cases cited : *Stewart v. Ins. Co.*, 9 Lea., 109.

2. INNOCENT HOLDER. *Of bonded warehouse receipt.*

The holder of a government bonded warehouse receipt, except he be an innocent holder for value, cannot maintain an action against the proprietor of the bonded warehouse for conversion of the whiskey therein described where the latter has, by appropriate legal proceedings, subjected it to public sale for the purchase price and become the purchaser thereof at such sale. It is held that the holder of the receipts, involved in this case, was not, upon the facts set out in the opinion, an innocent holder for value.

FROM ROBERTSON.

Appeal in error from Circuit Court of Robertson County. A. H. MUNFORD, J.

Marks & Co. v. Bridges & Son.

LOUIS T. COBBS for Marks & Co.

A. E. GARNER for Bridges & Son.

WILKES, J. This is an action commenced before a Justice of the Peace for the conversion of fifteen barrels of whisky.

On appeal to the Circuit Court it was tried before the Judge without a jury, and there was judgment for the defendant, and plaintiffs have appealed and assigned errors.

It appears that on March 5, 1892, J. C. Marks & Co. bought twenty-five barrels of whisky from Jno. R. Bridges & Son, for which they gave their note for \$617.54, due at sixty days. The whisky at the time was stored in the United States bonded warehouse of the sellers, and the government tax thereon had not been paid. The purchase note not having been paid when due, Bridges & Son filed an attachment bill to collect it. The whisky was attached May 18, 1892, and was sold January 25, 1893, and bought by Bridges & Son for \$678.12, and their debt was satisfied as well as the costs.

When the whisky was stored in this bonded warehouse, certificates were issued for it in five-barrel lots. These certificates were in substance as follows:

“Received from J. R. Bridges & Son on storage in my United States bonded warehouse, at Distillery No. 83, located near Springfield, Tenn.,

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in the Fifth District of Tennessee, the following described whisky for account and subject to the risk and order of J. C. Marks & Co., deliverable only on return and surrender of this receipt properly indorsed and payment of government tax and storage charges. This receipt is given in deference to the Tennessee warehouse laws as well as the laws of the United States. Loss or damage by fire, elements, shrinkage or natural decay at the owner's risk. Signed,

"THOMAS WATERS, *U. S. Storekeeper.*

"J. R. BRIDGES & SON, *Proprietors.*"

"Indorsed:

"J. C. MARKS & Co.

"F. V. EVANS & Co."

It appears that three of these certificates or receipts went into the hands of the Jefferson County Savings Bank, at Birmingham, Ala., in April, 1892. It is explained by the president of that bank that they were taken as collateral for a loan made to the firm of J. C. Marks & Co. by the bank; that Marks & Co. failed, and were attached in Alabama, and the bank sold these collaterals to F. V. Evans & Co., in December, 1893, at the price or rate of forty-two cents per gallon for the whisky represented by them. No notice was given to Jno. R. Bridges & Son of any of these matters until after they had sold the whisky under their attachment proceeding, when

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a demand was made for the whisky on behalf of F. V. Evans & Co., and it was refused upon the ground that Bridges & Son had already sold it and bought it in for their debt under the attachment proceeding. This suit was then brought by Evans & Co. in their own right, and by Marks & Co., for use of Evans & Co., against Bridges & Son, and is based upon the idea that after issuing their receipts, which are claimed to be the same as warehouse receipts, they converted the whisky to their own use. The case turns upon the effect to be given to these receipts or certificates, and to the rights which Evans & Co. acquired under their purchase from the bank.

In the case of *Tolly and Cannon v. F. M. Vanden & Co.*, from the Chancery Court of Lincoln County, decided by this Court several terms since (oral opinion), this Court passed upon the character and effect to be given to receipts exactly similar to these in every material respect. In that case the warehouseman had retained a lien for the unpaid purchase money, and this fact was recited in the face of the receipts or certificates. This Court held that such certificates could not be regarded as the usual statutory warehouse receipts, and are not governed by our statute of 1879, Chapter 236 (Shannon, § 3601), because such warehouse was in the joint possession of the owner of the warehouse and the government official; that such receipts are not negotiable as

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provided by that Act, nor do they vest in the transferee the absolute ownership of the property as provided by that Act. Shan.; § 3605. Still they were assignable (*Stewart, Gwynne & Co. v. Ins. Co.*), 9 Lea, 109, and all other questions aside, the transferee would have the right to apply for and receive the property on payment of government tax and storage charges. It was held that the lien attempted to be retained was indefinite, and not set out with sufficient particularity of detail to make it effective to hold the property or give notice to a transferee for value.

The Court in that case also passed upon the effect which must be given to the statement in the receipt that it was issued in deference to the Tennessee warehouse laws as well as the revenue laws of the United States.

The Court was of the opinion that the intent of the statement was to make the receipts negotiable under the Tennessee laws, and that they should circulate as bills of exchange or promissory notes, and have the same effect and virtue as warehouse receipts; that the intention of the warehouse keeper was to enable the parties to negotiate them as though they were statutory warehouse receipts. Stress was laid in that case upon the fact that the bank was an innocent holder for full value of the certificates, and that they had been regularly transferred to it, and this being plainly apparent from the record, the bank

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was allowed to recover upon the certificates, though not occupying the status of statutory warehouse receipts.

If in this case the purchaser of these certificates can be considered as holder in good faith, and for a full consideration, then it would be identical with that of *Tolly & Cannon v. Vanden & Co.*, and the plaintiffs would be entitled to recover. But upon this feature of the case the record is not at all satisfactory. It appears that the bank took them as collateral. This of itself would not prevent it from being an innocent holder, but the president of the bank, under a very searching cross-examination, fails and refuses to state the particulars of the transactions by which the bank became the holder of the certificates.

The bank president, on cross-examination, was asked when he got the receipts; how he got them; if they were bought or taken as collateral, or for cash loaned, or to secure a pre-existing debt, or in renewal of another note, and to state the facts fully and honestly.

The only answer given to this searching question was a general one that the bank took them as collateral for cash loaned at the time the receipts came into the hands of the bank.

He further says the bank has no entry of purchase of the receipts, and none of the sale

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of them on its books. The only entry it has is of a whole lot of whisky certificates (something like two hundred barrels) sold on the same day to various parties. It was impossible to obtain from him information as to what amount the bank had loaned upon the receipts, as he would only state in a general way that the bank loaned money upon them as collateral.

When the bank sold the receipts it declined to indorse them, and they were not at any time indorsed by it. This, no doubt, accounts for the fact that the suit in this case is brought in the name of Marks & Co., for the use of Evans & Co., and also in the name of Evans & Co. It is probable that the trial Judge looked with distrust upon this feature of the case, and did not consider the purchasers as holders in good faith and for value, and that the bank did not occupy such a position. In this view of the case there is evidence to support the verdict and judgment of the Court below. The statute, Shannon, § 3605, lays stress upon the feature that the transfer of such receipts must be *bona fide* and for value received.

We are of opinion the plaintiffs have not made out such a clear case of legal right to this whisky as must prevail over the strong equities of the defendants. The defendants, by legal process against Marks & Co. as nonresidents, proceeded to sell the whisky immediately after their

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note fell due, and bought it in at full value, and no notice was given of the claims of any one else upon the whisky until two years thereafter, when this suit was brought. On the other hand, the Jefferson County Bank makes but a weak showing of good faith in its title and claim to these receipts, and fails to impress the Court with its good faith in connection with them. Nor do the purchasers, Evans & Co., impress the Court with their good faith in the transactions. They profess to have bought the certificates from the bank without requiring any indorsement from it to protect themselves. They made no inquiry as to whether the whisky was still in the warehouse, although from the lapse of time it was probable the whisky might have been sold to pay the government tax, if for no other purpose. They never saw the whisky, nor tested its quality, and although they bought, as they profess, in 1893, never applied for the whisky, and gave no notice of their claim for it until about two years thereafter. The Court is strongly impressed that there was collusion between the bank, the defendants, Evans & Co., and the failing debtors, Marks & Co., to realize upon these certificates after the failure of Marks & Co., and when from all the circumstances they must have been affected with notice of the defendants' equities, and could not have exercised that good faith necessary to recover

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from the defendants for the conversion of this property.

An assignment is made to the admission of testimony to show that Bridges & Son did not keep the usual warehouse, but that the whisky was stored in a government bonded warehouse. We think this evidence was competent. In addition, all the facts that were material on this feature of the case appeared from the face of the receipts themselves, which showed that the whisky was stored in a government warehouse, and the receipts are executed by the defendants in connection with the government storekeeper.

We see no error in the judgment of the Court below, and it is affirmed with costs.

Baskette v. Streight.

BASKETTE v. STREIGHT.

(Nashville. February 16, 1901.)

1. ADOPTION. *Custody of child after death of adoptive father.*

The right to custody of an illegitimate infant child reverts to its surviving mother upon the death of its adoptive father to the exclusion of his surviving widow. But the mother's right will be subordinated to the best interests of the child.

Code construed: §§ 5409-5411 (S.).

Cases cited: *Lawson v. Scott*, 1 Yer., 92; *Gardenhire v. Hinds*, 1 Head, 404; *State v. Paine*, 4 Hum., 523.

2. SAME. *Same. Case in judgment.*

- The surviving mother is denied the custody of her illegitimate child of seven years of age in favor of the widow of its deceased adoptive father, when the mother is unable to properly care for it, and there exists an attachment, as well as a bond of blood, between the child and the widow, and there is no complaint of neglect or want of ability on the part of the widow to provide for it.

3. SAME. *Statutes relating to are strictly construed.*

Statutes relating to adoption of children, being in derogation of common law, are strictly construed, and will not be held in the absence of express provision to that effect to intend to confer rights to custody of children upon persons who are not parties to the record of adoption, and who have not assumed any of the obligations of an adoptive parent.

Code construed: §§ 5409-5411 (S.); §§ 4388-4390 (M. & V.); §§ 3643-3645 (T. & S.)

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. JNO. W. CHILDRESS, J.

Baskette v. Streight.

J. P. RAINS, A. G. EWING and FORD REDDICK
for Baskette.

JOHN RUHM for Streight.

McALISTER, J. E. D. Baskette and his wife, Victoria, filed this petition in the Circuit Court of Davidson County for the writ of *habeas corpus* to obtain the custody of James P. Streight, an infant of tender years. It is alleged in the petition that said child has no father, but that petitioner, Victoria, is its mother, and that the possession of the child is illegally withheld from her by the defendant, Mrs. James P. Streight.

Defendant, Mrs. Streight, answered the petition, and averred that she is the widow of James P. Streight, who departed this life in Nashville on July 26, 1900; that the petitioner, Victoria, has lately intermarried with co-petitioner, E. D. Baskette; that her maiden name was Victoria Claiborne; that the boy, James P. Streight, is the natural son of said Victoria Claiborne and of the deceased son of defendant and her late husband, James P. Streight. It is further alleged that on September 28, 1898, and during the life of the late James P. Streight, the said infant child, with the consent of its mother, the said Victoria Claiborne, was adopted by the late James P. Streight, in pursuance of regular proceedings in that behalf in the worshipful County Court of Davidson County. The petition filed in said cause

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by the late James P. Streight, which was also signed by the said Victoria Claiborne, recites that "petitioner is willing and anxious to adopt the said child as his own, and Victoria Claiborne, the mother of said child, being unable to care for him, consents to his being adopted by your petitioner." That petition was also signed by the said Victoria Claiborne, who joined in the adopting proceedings.

The Court ordered, adjudged, and decreed that the said child should bear the same relation to the petitioner, James P. Streight, as if he were his own child, with power to inherit and succeed to his estate, real, personal, and mixed, and that the name of said child should be James P. Streight.

It appears from the answer that the minor child had lived with James P. Streight and his wife for several years prior to its adoption. It is alleged therein that it is greatly to the welfare of the child that he shall remain with the defendant, Mrs. James P. Streight; that she is able to maintain and educate him; that she has great affection for the child, and that the latter is greatly attached to her; that she is childless, and lives with the family of Mr. Charles P. Streight, the brother of her late husband. It is charged in the answer that the petitioner, Victoria, is not a proper person to have the custody of

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the child, and that it would be to his detriment to take him from defendant.

The insistence of defendant is, that as the widow of the adoptive father of the child, she is legally entitled to its custody; that since the decree of adoption the child has been a member of defendant's family as though he had been born to her.

It was admitted on the hearing that the adoption proceedings were correctly set out in the answer; that James P. Streight, the adoptive father, was dead; that defendant had been for many years his lawful wife, and is now a widow; that since his death the minor child has continued to reside with Mrs. Streight. There was no proof in respect of the ability of either party to take care of the child, or touching the suitability of either party as a legal custodian, but upon the petition and answer, with the admissions of counsel just stated, the Court decreed that Mrs. Streight, widow of the adoptive father, was the proper and legal custodian of the child, and dismissed the petition with costs.

Petitioner appealed, and has assigned as error the action of the Court.

In support of this assignment of error it is insisted by petitioner that upon the death of the adoptive father the natural right of the mother to the custody of her child was revived, since the widow of the adoptive father was not a party

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to the adoption proceedings, and the natural rights of the mother were only relinquished in favor of the adoptive father.

It will be observed it is not charged in the petition that the child is neglected either in moral training or physical comfort, nor are there any reasons shown why the custody of the child should be changed, and the claim of the petitioner is based exclusively upon her legal rights as mother of the child. It has already been stated that petitioner joined with the late James P. Streight in his petition to the County Court for the adoption of the child, and in that petition she stated that she was unable to care for the child and educate him, and consents to his adoption by the said James P. Streight. She does not allege in the present petition that she has since become financially able to support and maintain the child.

The Tennessee statute of adoption is as follows, Shannon's Code, § 5409: "Any person wishing to adopt another as his child shall give the reasons therefor, apply by petition signed by the applicant, and setting out the terms of the adoption.

"Section 5410. The Court, if satisfied with the reasons given, may sanction the adoption by decree entered upon the minutes, embodying the petition and reciting the terms of the adoption.

"Section 5411. The effect of the adoption, unless especially restrained by the decree, is to confer

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upon the person adopted all the privileges of a legitimate child to the applicant, with the capacity to inherit and succeed to the real and personal estate of applicant as heir and next of kin, but it gives the person seeking the adoption no material rights of inheritance and succession, nor any interest whatever in the estate of the person adopted."

The adoption statutes of the other States present different features. Some require that the adopted person shall be under twenty-one years of age (Pennsylvania and Rhode Island). Others provide that there shall be a difference in ages of the adoptive parents and the adopted child of fourteen years. Many of the States require that if a man be married, he and his wife must join in the adoption of the child.

In *Nulton's Appeal*, 103 Pa. St., 286, it was held that as the wife did not join in the adoption, a child adopted by her husband during marriage did not become her child and heir. *Barnes v. Allen*, 25 Ind., 222.

It will be observed that the Tennessee statute does not require a joint application by husband and wife for the adoption of the child, but provides generally that any person may adopt another upon giving sufficient reasons and obtaining the sanction of the Court.

We have held recently that husband and wife may join in an application for adoption of an-

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other, and in some jurisdictions this practice is commended. It suffices to say in this case that the exclusive adoptive parent was James P. Streight. In his favor the natural mother relinquished her parental rights, and committed the child to his custody. The adoptive parent is now dead, and the question is whether the custody of the child passes to the widow of the adoptive father, or, are the legal rights of the natural mother revived and restored? If to the widow of the adoptive father, then the child occupies the anomalous attitude of child with no capacity to inherit or succeed to the real and personal estate of his alleged adoptive mother. But it is perfectly plain that under the express provisions of the statute the relation of parent and child was only established with James P. Streight, and that Mrs. James P. Streight was a stranger to the adoption proceedings, and can now assert no legal rights to the custody of the child.

It is said, however, that petitioner having joined in the adoption proceedings surrendered her parental rights, and is now estopped to assert them. This would undoubtedly be true in a contest with James P. Streight, the adoptive father, but the latter having died, there is now no room whatever for the application of an estoppel. We can well see how a mother might be willing to waive or entirely surrender her parental rights in favor of one person and be wholly unwilling to re-

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linquish them to another. One person, on account of his character and financial ability, might be a very suitable custodian for a child, and these considerations would probably enter very largely in the equation influencing the mind of the parent. Moreover, adoption statutes, being in derogation of the common law, are strictly construed, and cannot by intendment be held to confer rights upon persons who are not parties to the record, and who have assumed no legal obligations as adoptive parent.

In *Lawson v. Scott*, 1 Yer., 92, this Court said, viz.: "The mother of an illegitimate child, if able to support it, is entitled to its custody, and the County Court has no right to place it under the control of the putative father." The mother, then, is entitled to the custody of the child if she is able to support it. The welfare of the child is the paramount consideration that will govern the Court. Neither parent is entitled to the custody if it is palpably against the child's welfare, and in such case it may be awarded to a third person.

In *Gardenhire v. Hinds*, 1 Head, 404, it appeared that the child was a girl of frail and delicate constitution, eight years old, and had been principally reared by its grandmother, who was eminently fit and able to rear it in a proper manner, and willing to do so free of charge. The custody of such child was given to the

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grandmother in preference to the father, who had no wife or home, and whose means were limited.

It was held in *State v. Paine*, 4 Hum., 523, that the Court is not bound, in a proceeding in *habeas corpus*, to deliver the child to its father, but may act upon its discretion according to the circumstances of the particular case, the welfare of the child being the chief consideration.

The question then remains, What is best for the child in the present instance? The record shows that the child is now about seven years of age, and has been living with its grandmother, Mrs. James P. Streight, for four years. It is averred there is a strong mutual attachment between the child and Mrs. Streight.

In 1898, when the petition for adoption was filed, the natural mother, who joined therein, admitted that she was not able to care for and educate the child, and in the entire absence of proof showing present ability to maintain the child, the Court must presume that the same inability still exists. There is no charge that the defendant has neglected the child, or is not abundantly able to provide for its comfort and education.

We are constrained, therefore, to hold, upon this record, that it is the best interest of the child that it remain in the custody of its grandmother, Mrs. Streight, and for this reason the judgment of the Circuit Court is affirmed.

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INSURANCE CO. v. MORTON-SCOTT-ROBERTSON CO.

(Nashville. March 9, 1901.)

1. **INSURANCE, FIRE.** *Arbitration is a condition precedent to maintenance of action on policy, when.*

Arbitration must be made a condition precedent to action on a fire policy, and not a mere independent and collateral agreement, in order to render the insured's failure or refusal to arbitrate a bar to his action. It is not essential that the condition be expressed in terms, but it is sufficient if it can be fairly implied from a consideration of the entire policy. (*Post*, pp. 569-575.)

2. **SAME.** *Same. Case in judgment.*

Arbitration becomes a condition precedent, and the insured's refusal to enter into it will bar his action on a fire policy that stipulates for arbitration without making it in terms a condition precedent and contains these additional clauses, to wit :
"This company shall not be held to have waived any of the provisions or conditions of this policy, or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal on any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claims shall be sustainable in any court of law or equity until after full compliance by the insured, with all the foregoing requirements." (*Post*, pp. 569-575.)

3. **SAME.** *Joint demand for appraisal insufficient.*

A joint demand for an appraisal made by several co-insurers of the same property, whose several policies provide for an appraisement by two, one to be selected by the company and the other by the insured, who, in case of disagreement, are to call in a third, is insufficient as to each and all the insurers. There must be, in such case, a separate demand by each company. (*Post*, pp. 575-578.)

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4. **SAME.** *Demand for appraisal of salvage unauthorized and invalid.*

A demand by an insurance company for the appraisal of a salvage claim is ineffectual for any purpose and invalid under a policy providing only for appraisement of the "loss or damage" sustained.

There can be, in such case, but one appraisal demanded, and that of the "loss in the aggregate." (*Post*, p. 578.)

5. **SAME.** *Sale of part of salvage by insured does not defeat appraisal, when.*

It affords no lawful ground for the insurer's refusal to proceed with an appraisal proposed by himself and assented to by the insured, that the insured had, under a policy giving the insurer the option to take all or any part of the saved articles at their appraised value, disposed of part, to wit: One-seventh of the salvage, when such disposition of salvage was made by implied consent of the insurer, and a full description of the articles sold was preserved, and there remained in specie an abundance of the articles sold to satisfy the particular insurer's claim. (*Post*, pp. 578-583.)

6. **SAME.** *Expense of selling salvage, how borne.*

Where salvage is sold by the insured in connection with his other business it is proper to charge it with a due proportion of the expenses of the entire business. (*Post*, pp. 583-585.)

Case cited: *German Bank v. Haller*, 103 Tenn., 84.

FROM DAVIDSON.

Appeal in error from Circuit Court of Davidson County. JNO. W. CHILDRESS, J.

J. J. VERTREES and PILLOW & TYNE for Insurance Co.

LELLYETT & BARR and JNO. A. PITTS for Morton-Scott-Robertson Co.

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McALISTER, J. This is a suit upon a policy of fire insurance. Verdict and judgment were in favor of plaintiff for the sum of \$1,064.32, amount of the policy and interest. The company appealed, and, among other assignments of error, it is urged that there is no evidence to support the verdict. The policy in suit insured the plaintiff against direct loss or damage by fire to their stock of carpets, furniture, etc., contained in their storehouse on Union Street, in the city of Nashville. The aggregate insurance on their stock was \$31,000, covered by twenty-three policies, issued by seventeen different companies. The concurrent insurance was authorized by the several policies, and no question is made in respect of additional insurance.

Companies representing \$15,000 of this insurance settled and adjusted their liability without suit.

The fire occurred on December 9, 1898, and there is evidence tending to show that the loss sustained was largely in excess of the entire insurance. The value of the stock at the time of the fire is shown by the following table, to wit:

(1) Inventory June 1, 1898.....	\$29,523 40
(2) Goods purchased between June 1, and December 9, 1898	30,458 69
(3) Goods sold, charged, and not de- livered	473 00
(4) Goods held in trust for others....	85 00
(5) Appreciation by advance in prices.	4,465 49
Total	<u>\$65,035 58</u>

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The gross sales from June 1 to De-	
cember 9, 1898	\$34,892 54
These goods cost the sum.....	23,147 00
Total value at time of fire.....	41,888 58

These items are sustained by ample evidence to have warranted the jury in finding them correct.

It is objected that the item of appreciation of stock amounting to \$4,465.49 was not included in the statement of loss submitted by the company to the insurance agents on Monday succeeding the fire. That is explained, however, by the fact that the first statement was made up hurriedly, and this item was overlooked.

It was stated and claimed at the first interview between the plaintiff and the insurance adjusters, and steadily insisted on throughout the negotiations that followed. It is supported by material evidence, and must be held to have been established by the verdict of the jury.

The proof shows that on Monday, December 12, succeeding the fire, adjusters representing the various insurance companies interested met at Nashville and entered into an organization, electing a chairman and secretary. This board adopted the following resolutions, to wit:

“1. In all matters of difference, a majority as represented by the insurance companies present shall rule.

“2. That stock in basement and grade floor

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shall be removed, and then if the committee deems advisable shall be disposed of."

This board, it appears, continued in session from day to day until the twenty-second of December, when they entered into an agreement by resolution "that there should be no independent action, but that they all should communicate and confer with each other."

It appears that on Tuesday succeeding the fire there was a conference between the adjusters and representatives of plaintiff, and a discussion ensued as to what disposition should be made of the salvage or damaged goods saved from the fire. A committee was appointed to consider this question, and after visiting the premises and inspecting the condition of the damaged goods, the committee recommended that the salvage in the basement and on the grade floor be offered for sale to the highest bidder. An advertisement was accordingly made in the public prints, but no acceptable bid was received.

It appears that about this time the adjusters concluded to demand an appraisement of the saved goods, and such an appraisal was proposed to the representatives of the insured. The insured insisted that the first step in an appraisement was to ascertain the value of the entire stock of goods at the time the fire occurred, and that at the same time they could find out the value of the goods saved, and thus settle the whole loss. The

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adjusters, however, declined this proposition, insisting upon an appraisal of the salvage alone. The insured insisted that he was ready and willing for an appraisal provided it settled everything.

The adjusters had before them all the policies, books, papers, and invoices of the insured, including a statement of the loss. They inspected the wreck and saw the salvage, but they made no estimate of its value, nor a statement of the value of the stock at the time of the fire, nor any estimate of loss, nor did they agree to the correctness of any item in plaintiff's statement of loss. The adjusters simply demanded an appraisement of the salvage, but not an appraisement of the entire loss.

It further appears that on December 16 the several adjusters made a joint demand for appraisal as follows, to wit:

"A difference having arisen in the amount of the damage done upon stock of goods by reason of a fire which occurred on December 9, 1898, we now demand that the amount of these damages be submitted to arbitration as provided for in the section of the policies under which you make your claims." This demand was signed jointly by all the special agents and adjusters representing the companies interested. The plaintiff understood this letter to be a joint demand for an appraisal of the salvage alone, hence, in its reply, after referring to the fact that its statement of loss

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had not been seriously controverted by the agents, stated, "You now demand of us an appraisal of the salvage, and propose to leave the question as to cash value of the stock a matter for consideration after the appraisement has been made. To this we are unwilling to assent." The letter continued, "A committee was appointed by you to examine the premises. That committee reported that it would be advisable to offer for sale the salvage in the basement and on the first floor. To this we gave our assent. We are not averse to an appraisement, but object to an appraisement of the salvage and afterwards another appraisement as to value of stock."

In view of what had been transpiring in the negotiations of the board and the insured for a settlement, the joint demand was understood by the plaintiff, as a demand for the appraisal of the salvage alone. Plaintiffs in their reply so informed the adjusters, and the latter did not correct this impression. They made no reply to the insured's letter. However, the oral negotiations and conferences continued until December 22, when further effort at a settlement was suspended. There is evidence tending to show that in the meantime a representative of the insured met Col. Young, chairman of the board of adjusters, and asked him if there was going to be any trouble about the salvage, and the latter responded, "Go ahead and handle the salvage; you have a per-

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fect right to do it. Go ahead." Thereupon plaintiff rented Amusement Hall, and about the eighth of January began to move therein the damaged stock saved from the first floor and basement of the store. These goods were cleaned and renovated, and after being thoroughly advertised in the public prints, were sold at public auction for \$1,250. Private sales amounting to \$300 or \$400 had theretofore been made. It should be remarked that the goods on the second and third floor of the store were not removed, but were reserved for private sale at some future time when the business of the firm should be resumed.

Thus matters rested until January 16, 1899, when the special agents and adjusters made separate and distinct written demands for an appraisal. This was done in all likelihood to remedy any legal objection that might be made to the joint demand for an appraisal which they united in making December 16th ult. On January 20 the plaintiff transmitted to the home office of the defendant company formal proofs of loss resulting from said fire. The defendant company replied January 31, 1899, acknowledged receipt, and concluding its letter as follows: "We renew our previous demand for an appraisal of the value of the goods saved from the fire and the damage done to them, in order that compliance with the terms of the contract between you and the company may be had, differences having arisen

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between us concerning the amount of your loss." Thus it will be seen that as late as January 31 this defendant company is only insisting upon an appraisal of the salvage. It renews its previous demand on this subject.

The plaintiff, on February 21, wrote to defendant company acknowledging receipt of letter of January 31 furnishing an inventory of saved goods, with an estimate of their value. This letter, after dealing with certain matters at issue, states, viz.:

"In conclusion we beg to submit that the right of the Palatine Insurance Company to demand an appraisal has, in our judgment, been waived, but we are still ready to agree to an appraisal, and consent that it be had according to the terms of the policy. You may, therefore, come forward and at once enter into a final arrangement with us for an appraisal."

The defendant company replied to this letter, in which they stated that the fact that a part of the salvage had been disposed of would present a serious obstruction in the way of an appraisal, and inquired whether it was true that the salvage had been disposed of. There is evidence tending to show that the defendant company had been apprised of this fact for almost six weeks, and yet it expresses surprise at the statement of this fact in the plaintiff's letter. On March 3, 1899, plaintiff replied that full evidence of the value

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of the salvage sold had been preserved, and that more than four-fifths of the salvage (in a greatly improved condition) was still in the building ready to be viewed by the appraisers. Concluding, viz.:

“Therefore we again express our assent to appraisal, and trust it will be no longer delayed by you.”

Defendant company replied to plaintiff's letter on the seventh of March, stating that they would not enter into a “fragmentary appraisal after plaintiff had sold and disposed of a part of the salvage.” This letter closed the correspondence, and thereupon plaintiff brought this suit.

The principal ground relied on by defendant company to defeat the collection of the policy is that the assured refused to submit to an appraisal or arbitration as provided by the insurance contract, and that this was a condition precedent to any right of action on the policy, or liability against the defendant. The provisions of the policy necessary to be noticed, in order to an intelligent understanding of the controversy, are the following:

“This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall, in no event, exceed what it would then cost the insured

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to repair or replace the same with material of like kind and quality. Said ascertainment, or estimate, shall be made by this company and the insured, or if they differ, then by appraisers as hereinafter provided, and the amount of loss or damage having been thus determined, the sum for which this company shall be liable in pursuance of this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proofs of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do. But there can be no abandonment by this company of the property described."

The "hereinafter provided" of this original and leading clause reads as follows: "In the event of disagreement as to the amount of the loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall elect a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating sep-

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arately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and an award, in writing, of any two shall determine the amount of such loss. The parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire. This company shall not be held to have waived any of the provisions or conditions of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. (Lines 86 to 95 of the policy.) No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of Law or Equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire."

It was assumed by the trial Judge in his charge to the jury that the stipulation of the policy in respect of appraisal was a condition precedent to any right of action on the policy. This proposition is seriously controverted in this Court by counsel for the insured, his contention being that such stipulation is a mere collateral

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and independent condition, a breach of which will not work a forfeiture of the policy, because not so expressly provided therein. It is insisted on behalf of the company that the general clause following the enumeration of the terms and conditions of the policy constitute appraisal a condition precedent. The general clause at the foot of the policy is, viz.: "No suit or action on this policy for the recovery of any claim shall be sustained in any Court of Law or Equity until after full compliance by the insured with all the foregoing requirements," etc.

It is argued that the policy provides that ascertainment or estimate shall be made by both parties, and if they differ as to their respective estimates, then they can have recourse to appraisal "as hereinafter provided," and that it is hereinafter provided that appraisal is dependent, first, upon the event of disagreement, and, second, upon the fact of its being required by the company. In other words, that it is a condition optional with the company, and does not establish a forfeiture for a failure to observe its conditions.

It is then argued that in order for a failure to arbitrate to operate against the insured, the necessity for an award must be expressly made a condition precedent in the policy, citing *Reed v. Ins. Co.*, 103 Iowa, 307; *Reed v. Washington*

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F. & M. Ins. Co., 138 Mass., 572; *Clement v. British-Am. Ins. Co.*, 141 Mass., 298.

In *Insurance Company v. Alvard*, 61 Fed. Rep., 755, it was held that in order to make such award a condition precedent to the right of maintaining suit, it must be so expressed in the policy, unless necessarily implied from its terms. A mere provision in the policy that the amount to be paid in case of disagreement shall be submitted to arbitration does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until afterward. Such agreement to submit to arbitration is regarded as a collateral and independent agreement, a breach of which, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. "There is nothing in the terms of the policy," said the Court, "which expressly, or by implication, forbids the insured from bringing suit until after the amount of the loss had been submitted to arbitration and an award had been made, and therefore we must consider the provisions in the policy relating to this object as constituting a collateral and independent condition, and not one which was precedent to maintaining an action."

In looking to this case it will be seen that the clause in the policy on the subject of arbitration or appraisal is identical with the provisions of defendant's policy on the same subject, but it

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does not appear from the opinion that the policy contained the general clause which is found in the present policy, to wit: "No suit or action shall be brought until after full compliance by the insured with all the foregoing requirements," etc.

In *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S., 242, it was held that a condition in a policy of fire insurance that any differences arising between the parties as to the amount of loss or damage of the property insured shall be submitted, at the written request of either party, to the appraisal of competent and impartial persons, whose award shall be conclusive as to the amount of loss or damage only, and shall not determine the question of the liability of the insurance company, etc., and that until such appraisal and award no loss shall be payable or action maintainable, is valid. Said Mr. Justice Gray, who delivered the opinion of the Court, "The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action."

The question again arose in *Hamilton v. Home Ins. Co.*, 137 U. S. Mr. Justice Gray again delivered the opinion of the Court, and said: "This case resembles, in some aspects, that of *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S., but it is essentially different in this

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important and controlling element, that there was no provision of the policy postponing the right to sue until after an award. If the contract provides that no action upon it shall be maintained until after such award, then, as was adjudged in *Hamilton v. Liverpool, London & Globe Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent, and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract."

It is conceded that in the policy before us there is no express provision postponing suit until after appraisal or award, but it is assumed that the general clause of the policy is equally as efficacious, namely: "No suit or action shall be brought until after full compliance by the insured with all the foregoing requirements" referring to all the terms and conditions of the policy.

In addition to this the policy provides that "the loss shall not be payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss have been received by the company, including award by appraisers, when appraisal has been required." It is not necessary, as decided in

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numerous cases, to constitute a condition precedent, that there should be express language prohibiting suit until award is made. It is sufficient, if, construing the entire contract, such intention is necessarily implied.

In *Conn. Fire Ins. Co. v. Hamilton*, 59 Fed. Rep., the Court said, viz.: "In some of the leading cases, where it was held that the terms of the contract established a condition precedent, there was no express provision that an action should not lie before the award was made. A condition necessarily implied from the terms of the contract is treated as equivalent to an express agreement that no action shall be brought until the award is obtained. It is always a question of construction. Whatever the language may be, if the intention of the parties is sufficiently apparent, effect will be given it."

In *Mosness v. German-Am. Ins. Co.*, 50 Minn. 341, "the policy provided for the appointment of appraisers in the event of the disagreement between the company and the assured as to the amount of the loss, and also provided that no action could be brought until after full compliance by the assured with all the foregoing requirements," it was held that arbitration and award was a condition precedent to recover on the policy.

Said the Court, construing together, as they must be construed, the various provisions found in the

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present policy in reference to an appraisal and award, "they constitute a condition precedent to plaintiff's right of action when circumstances transpired to which the language was applicable—that is, when the insurer and insured disagreed on the amount of the loss."

We think, upon a fair construction of the policy now in suit, compliance with the appraisal clause must be regarded as a condition precedent to the maintenance of the suit.

The second assignment is that the Court erred in charging as follows: "It is proper here for the Court to instruct you that until January 16, 1899, there had been no legal demand by the defendant upon the plaintiff for an appraisement in accordance with the terms and conditions of the policy—that is, of an appraisement of the loss, and damage, theretofore the efforts having been made either verbally or by joint demand with the other companies carrying this insurance, neither of which was valid and binding."

The criticism made upon this charge is twofold. First, that the Court should have instructed the jury what constituted a legal demand, and let the jury determine from the facts and law as charged by the Court whether or not legal demand for appraisal had been made. Second, that as the policy itself does not require a written demand for an appraisal, a verbal demand would have been sufficient.

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We do not concur with counsel in construing this charge to mean that a verbal demand for an appraisal of the whole loss would not be sufficient under the policy. The context of the charge shows that the trial Judge had reference to the demand for an appraisal of the salvage. The Court had just instructed the jury that such a demand was not authorized by the policy. The demand for an appraisal of the salvage was in fact a verbal demand, but in the opinion of the Court was not valid whether verbal or written. It was to this demand the Court had reference when he said that the verbal demand made was not valid and binding upon the plaintiff. The Court did not say that a verbal demand for an appraisal of the whole loss would be insufficient.

The record shows that the only demand for an appraisal made by the defendant company prior to January 16, 1899, was the joint demand which it made in connection with the other companies on December 16, 1898. Eleven agents, representing as many different companies, joined in the demand upon the plaintiff that the amount of his damages be appraised as provided for in the section of the policies under which the loss was claimed. This was not a legal demand.

Says Mr. Joyce in his work on insurance, Sec. 3245, viz.: "A joint demand for an appraisal by several insurance companies is not within the terms of a policy issued by one of the companies pro-

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viding for an appraisement by two persons, one to be selected by the company and the other by the insured, who in case of disagreement are to call in a third. There should be a separate demand." Citing *Connecticut Fire Ins. Co. v. Hamilton*, 59 Fed. Rep., 258; *Hamilton v. Phoenix Ins. Co.*, 61 Fed. Rep., 385; *Harrison v. German-American Fire Ins. Co.*, 67 Fed. Rep., 585.

In *Connecticut Fire Ins. Co. v. Hamilton*, 59 Fed. Rep., it appeared that the agents of twelve insurance companies interested in the loss joined in a demand upon the insured that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons chosen as provided for in the several policies of insurance under which claim is made, etc. Said the Court: "That was not a demand for an appraisal by the insurance companies, such as its policy gave it the right to make. It (the company) did not acquire its rights in any respect from the policies of other companies, and it had no legal concern with their disputes, or the mode to be adopted for their settlement, and had no obligation to champion their cause or to mix its controversy with theirs, and the insured was not bound to accept such proposition for determining the value and damage as was demanded by the companies, this among them."

We therefore hold, under the general rule, that

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this joint demand for an appraisal was illegal, and imposed upon the assured no duty to enter upon an appraisal or arbitration. So that we concur with the trial Judge in his instruction to the jury that there was no legal demand by defendant company for an appraisal until January 16, 1899, when it made a separate demand.

We are also of opinion that any demand for the exclusive appraisal of the salvage was not warranted by the policy. The appraisal or arbitration clause provides that in the event of disagreement as to the amount of the loss, it shall be ascertained by two competent and disinterested appraisers. The appraisers shall estimate the loss, stating separately sound value and damage, etc. It was never contemplated that either party should have the right to demand separate and successive appraisals of different kinds of demands entering into the amount of the loss. The object of appraisal is to fix the loss in the aggregate, and this result cannot of course be reached by ascertaining the value of one or more constituent elements of the loss. We are therefore of opinion that the insured was well warranted by the terms of the policy in declining the demand of the company for an appraisal of the salvage alone. Of course we do not hold that the parties could not by consent agree on a partial appraisement.

It appears that on January 16, 1899, the defendant company addressed a letter to the plain-

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tiff stating that "a difference having arisen in the amount of the damage done to your stock of goods by reason of the fire, we now demand on the part of this company the amount of these said damages be submitted to appraisal as provided for in the section of the policy of the Palatine Insurance Company, London, Limited, under which you make your claim."

This communication, it will be observed, contains a separate demand for a general appraisal, and was such a demand as the company was authorized to make under the appraisal clause of its policy. The insured did not at once answer this demand, but transmitted to the company, through its attorney, formal proofs of loss. Some correspondence then followed respecting the proofs of loss, and on February 21 the insured agreed to have an appraisal according to the terms of the policy. Defendant company then declined to enter into an appraisal, upon the ground that the insured had sold and disposed of part of the salvage. There is proof tending to show that the insured at that time still had on hand four-fifths of the salvage, and had disposed of the remaining one-fifth with the knowledge and implied acquiescence of the defendant company, its agents or adjusters, or at least with the knowledge of the Board of Adjusters, who were acting in concert and combination. In this connection counsel for defendant company requested the Court to charge,

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viz.: "If you find from the evidence that after a period of controversy, in which the parties were unable to agree, they differed in good faith as to the amount of the loss, and that the defendant, in writing, made a separate demand for an appraisement of the loss in accordance with the terms of the policy, and that the plaintiff thereafter, in writing, consented and agreed to an appraisement of the loss in accordance with the terms of the policy, this agreement was a waiver of the right on the part of the plaintiff to insist upon any previous waivers of the defendant. And if you find the facts to be as above stated, and that in the meantime the plaintiff had, without the defendant's consent, sold and disposed of a material part of the salvage goods without informing the defendant thereof in its letter assenting and agreeing to an appraisal, or in any other form, the Court instructs you that the defendant company had the right to refuse to proceed further with the appraisal called for, and the plaintiff cannot recover in this action."

Error is also assigned upon the refusal of the trial Judge to give the following instructions to the jury, namely: "The right of the defendant to take its *pro rata* of the salvage goods at the valuation fixed by the appraisers when an appraisal had been demanded and had, is a valuable right assured to it by the policy or contract, and if, therefore, you find the parties dif-

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ferred in good faith as to the loss, and the defendant demanded, in writing, an appraisal according to the terms of the policy, the demand being a separate demand, and that the plaintiff replied thereto assenting and agreeing to an appraisal, the plaintiff thereby waived its previous right to object to such demand, and bound itself to enter upon such appraisal as the policy contemplates and provides for. And if you find that plaintiff had disposed of a material part of the salvage goods without the consent of the defendant, either before or after such demand, so that the same could no longer be appraised or valued, the Court instructs you that such disposition justified the defendant in its refusal to proceed with the appraisal, and precludes the plaintiff from recovering in this action."

Now we think the instructions asked were properly refused, for the following reasons: First, the proof tended to show that the salvage was sold with the knowledge and acquiescence of the Board of Adjusters, whose action was binding upon the defendant company. That board determined by resolution that the salvage in the basement and on the first floor should be sold, and advertised for bids, but could get no reasonable offer. Afterwards Col. Young, chairman of the Board of Adjusters, told a representative of the plaintiff to go ahead and dispose of the salvage. Second, the amount disposed of by plaintiff was but a

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small proportion of the salvage, not exceeding probably one-seventh in value, and a sufficient amount was still on hand to have enabled the defendant company to have exercised its option, under the policy, to take its *pro rata* of the salvage.

As already stated there was \$31,000 of insurance upon the property, of which \$15,000 had been settled before this suit was brought. The adjusting companies settled upon a basis of \$28,000 as covering the entire loss, the insured to keep the salvage. It was after this partial settlement with the other companies that the insured sold about one-seventh of the salvage, preserving a detailed statement of the articles, their value, etc. The total sum realized on the salvage claimed to have been improperly sold, did not exceed \$1,500, which left unsold and still on hand about \$10,000 of salvage. Now, upon these facts the Circuit Judge instructed the jury, viz.: "The Court instructs you upon this point that the defendant was only interested in said option (that is, the right to take the salvage upon the appraisement) in proportion as the policy issued by it bore to the total number of policies and amounts involved—that is, as one thousand was to thirty-one thousand; and if you should find from the proof that the demand of the defendant, made January 16, for an appraisal was assented to by the plaintiff, who offered to proceed with the same,

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and that the defendant refused to proceed therewith, in conformity with his demand, by reason of the fact of the sale and disposal of part of the damaged goods, and that the amount of said damaged goods was only a small proportion of the total amount of such goods, and that notwithstanding said sale by the plaintiff, if there should have been enough of said damaged goods left to be valued and appraised, out of which the defendant could have exercised its option as stipulated above, and if the amount sold by plaintiff could still have been ascertained and appraised notwithstanding said sale, then, and in that event, the Court instructs you that the defendant cannot rely upon that defense," etc.

We are of opinion that the charge given fully covered this aspect of the case, and that the instructions asked by counsel for defendant company were properly refused.

The next assignment of error is based upon the Court's charge in reference to the apportionment of the salvage expense. The business of the plaintiff was resumed about April 15, after the fire, and the bulk of the salvage goods were carried with the new stock and sold off as opportunity offered.

The Court charged the jury that it was the duty of the plaintiff to have sold the salvage goods to the best advantage, realizing therefrom as much as possible; that on doing this plain-

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tiff was entitled to any reasonable cost and expense in preparing these goods for sale and disposal, and that this expense would include any house rent, clerk hire, taxes, or other legitimate expenses incurred therein, and that if the same (salvage) was kept in the store of the plaintiff in conducting their regular business, if it was handled, cared for, and sold by the same clerks and force, that said damaged goods should be charged with their proper proportion of the expenses of the same."

The objection to the charge is that the salvage is charged with a proper share of the expenses of plaintiff's entire business after the fire. It is insisted that the sale of the salvage was a mere incident to the general business, and that only such expenses should be allowed plaintiff as were incurred because of and on account of the salvage. The Court, it will be perceived, left it to the jury to say, in view of all the facts, what would be a proper proportion of the expenses with which the salvage goods should be charged.

In *German Bank v. Haller*, 19 Pickle, the trustee had put new goods with the trust stock, and expenses, such as store rent salaries, and incidentals, were incurred for both stocks, and the question as to proportioning that expense arose, the trustee insisting that the trust stock should bear it all. This Court said: "We know of no good reason why a trustee engaged in executing

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a trust, and selling goods thereunder, may not engage in a separate and distinct business, that does not interfere with or detract from his duties and services in regard to the former. It may be a circumstance which may be looked to in determining what his compensation should be for the execution of his trust, if it interferes with it, but it is not an item which would swell the assets of the trust. But, while this is true, it is also, as we think, plain that the expense is incurred about both businesses jointly. It should be borne by each in the proper proportion. And the entire burden should not be borne by the trust goods to the exoneration of the other stock. The items in this case for advertising, salaries, and incidentals and store rent were incurred for both stocks, amounting to \$5,257.64, and should have been borne in some proper proportion by each." *Idem*, 84 (19 Pickle).

We understand the Court in this instruction to have submitted to the jury the question as to the proper proportion of the expense of the salvage goods, to be determined in view of all the facts surrounding its sale, and we find in this instruction no reversible error.

Affirmed.

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RAILROAD v. WEBSTER.

(*Nashville*. March 12, 1901.)

1. **RAILROADS.** *Liability for killing stock on unfenced track defined.*

The liability of a railroad company for stock killed or injured by its moving trains is, under the statute, absolute where its track is not lawfully fenced. (*Post*, p. 587.)

2. **SAME.** *Contract for non-liability for killing stock does not run with land.*

A contract whereby an adjacent land owner agrees with a railroad company, in consideration of its furnishing a part of the materials, to erect and perpetually maintain a fence along his line, parallel with and fifty feet from its track, and to release the company from all liability for stock killed or injured by its running trains, is a mere personal obligation of the particular land owner, and does not run with the land so as to bind or affect any subsequent purchaser or owner thereof. Such contract does not pass either such title or easement in the land as will support a covenant real. (*Post*, pp. 587-596.)

Case cited: *Sanders v. Martin*, 2 Lea, 215.

3. **DEED.** *Void for want of description.*

A deed is void for want of sufficient description whose only identification of the premises intended to be conveyed, is in these words, to wit: "The party of the first part is the owner of certain lands fronting 4,574 lineal feet on said second party's line of railroad, on mile 295 of Henderson Division." (*Post*, pp. 589-596.)

Cases cited: *Dobson v. Litton*, 5 Cold., 616; *Johnson v. Kellogg*, 7 Heis., 265; *Dougherty v. Chesnutt*, 86 Tenn., 1; *Wood v. Zeigler*, 99 Tenn., 515.

FROM ROBERTSON.

Appeal in error from Circuit Court of Robertson County. LYTTON TAYLOR, Sp. J.

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H. T. TRUE and A. E. GARNER for Webster.

CHAS. N. BURCH, J. W. JUDD and LOUIS T. COBBS for Railroad.

McALISTER, J. This suit was commenced before a Justice of the Peace to recover damages for the wrongful killing of plaintiff's mule by the railroad company. The trial in the Circuit Court before Hon. Lytton Taylor, Special Judge, and a jury resulted in a verdict and judgment in favor of the plaintiff for the sum of one hundred dollars. The company appealed, and has assigned errors. On the trial below there was evidence tending to show that the defendant company had not kept its track fenced in the manner prescribed by law, and the animal having escaped from its owner's premises strayed upon the track and was killed by a passing train. Under the statute the failure of the company to keep its track fenced and in repair makes its liability absolute for the killing of stock. In this view it is not seriously denied that the proof makes out a case.

The real controversy, however, arises upon the action of the trial Judge in excluding two written instruments offered in evidence. The object of this evidence was to show that plaintiff's grantor had entered into a covenant, running with the land, with the defendant company by which the company was to be exempt from liability for

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killing stock in consideration of furnishing material to keep up the fences. The first instrument was a deed dated October 8, 1894, from Dr. J. M. Harris to Chas. and Ben F. Webster, the present plaintiff, conveying in fee two tracts of land lying in the Twelfth Civil District of Robertson County. The second instrument was a contract entered into on January 9, 1892, between Dr. J. M. Harris and the defendant railroad company, which contract was duly acknowledged and recorded in the Register's office of Robertson County, viz.:

"This contract, entered into this ninth day of January, 1892, between Dr. J. M. Harris, of the county of Greene, State of Ohio, of the first part, and the Louisville & Nashville Railroad Company, of the second part, witnesseth: That whereas the said Dr. J. M. Harris, the first party, is the owner of certain lands fronting 4,574 lineal feet, more or less, on said second party's line of railroad, on mile 295 of Henderson Division, and desires to build a fence along his line next to said railroad fifty feet from the center of track. Therefore, in consideration of the second party furnishing at the depot at Greenbrier, Tennessee, station, the wire and the staples sufficient to construct a fence of seven strands, the said first party hereby agrees, for himself, heirs, and vendees, that he and they will furnish the balance of the material, erect and perpetually

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maintain such fence at his and their cost and expense, and hereby release the said second party from all claims for damages by reason of his or their stock or cattle, or any stock or cattle in their charge, straying upon said railroad, and there being killed or injured.

"It is further agreed that repairs to said fence shall be made on same basis, the railroad company furnishing the wire and staples, and the party of the first part furnishing the balance of the material and doing the work. Said immunity from claims or liability for damages for killing or injuring such stock or cattle shall be a perpetual charge upon said land, not only as against its present owners, but also as against all persons who may hereafter own said land.

"In testimony whereof, we have hereunto set our hands and seals, the day and year herein written.

J. M. HARRIS,

"Louisville & Nashville R. R. Co.

"By J. G. METCALF, Gen'l Mgr.

"Witness:

"GEORGE COOPER,

"CHARLES S. JOHNSON."

In connection with the deed and contract the defendant company offered to prove that the Dr. J. M. Harris who executed the deed to the plaintiff was the same person who executed the contract; and the land described and conveyed in the deed is the same land mentioned in the

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contract. The Court, on objection from plaintiff's counsel, excluded this evidence.

It is insisted on behalf of plaintiff that the action of the Court in excluding the contract between Dr. J. M. Harris and defendant company was correct upon two grounds: (1) That it contains no description of the land; (2) that it is merely a personal covenant between Dr. Harris and defendant company, and does not run with the land so as to bind the successors in title of Harris.

It is insisted on behalf of plaintiff that the description and location of the land is not sufficient to give actual or constructive notice of what particular land was referred to in the contract; that it does not recite in what State, county, or civil district the land is situated, and that an inspection of the record would not have put a purchaser upon inquiry. The only description given in the contract is that "the party of the first part is the owner of certain lands fronting 4,574 lineal feet on said second party's line of railroad, on mile 295 of Henderson Division."

It is insisted, however, that parol proof is admissible to show what particular land was intended, and in that view defendant company offered to prove that the land described and conveyed in the deed from Dr. J. M. Harris to the plaintiff is the same land mentioned in the contract. The Court, however, excluded this offer of evidence.

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In *Dobson v. Litton*, 5 Cold., 616, the Court stated the rule on this subject as follows: "Where an instrument is so drawn that upon its face it refers necessarily to some existing tract of land, and its terms can be applied to that one tract only, parol evidence may be employed to show where the tract so mentioned is located. But where the description employed is one that must necessarily apply with equal exactness to any one of an independent number of tracts, parol evidence is not admissible to show that the parties intended to designate a particular tract by the description. The rule in that case was announced with reference to the following writing, viz.: 'I have this day sold to W. K. Dobson a certain tract of land containing nine acres and sixty-six poles, near the junction of Broad Street, Nashville, and the Hillsboro Turnpike, Davidson County, Tennessee, for the sum of four thousand dollars.' "

In *Johnson v. Kellogg*, 7 Heis., 265, it is said "if the contract be for the sale of a tract of land well known by some name given to it in the contract, in such case no doubt that would be a sufficient description, and, if necessary, parol proof might be heard to show where the property is. In such case," continues the Court, "it will be observed that the parol proof thus resorted to is not to introduce any additional evidence as to the terms or stipulations of the contract,

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but simply to ascertain if there be lands or property known by the name or description given in the writing, and where that property is." 4 Bax., 548. These rules were applied by this Court in *Dougherty v. Chesnutt*, 2 Pickle, 1. The description of the land given in the lease was, viz.: "All the right to quarry marble on the farm of Henderson Fudge known as Rose Hill." The Court held that this farm was sufficiently well known by the name of "Rose Hill" to furnish an identification and description of the land in the writing to meet the requirements of the statute, and that evidence might be heard to show the location of the property. The Court, however, was careful to remark that the instrument showed on its face that Henderson Fudge, the lessor, and W. F. Wright, the lessee, both lived in Hawkins County, Tennessee, from which it may be reasonably inferred that the lands lay in that county. The contract in the case at bar cannot be assimilated to the case last cited. The residence of the vendor, Dr. J. M. Harris, is stated in the face of the contract to be in Greene County, State of Ohio, while the situs of the railroad company is not stated at all. The contract does state that the material for building the fence to be furnished by the railroad company shall be delivered at Greenbrier, Tenn., but there is no recitation or intimation in the contract that this farm is at or near Green-

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brier, Tenn. The whole description is that the said Dr. J. M. Harris is the owner of land on mile 295 of Henderson Division. We find here no general description of a particular tract of land by which it is known and can be identified, but this description would equally apply to the land on both sides of the railroad. There is nothing on the face of this contract that would give notice, actual or constructive, of this incumbrance to a purchaser who was in good faith investigating the title.

The latest case on this subject is *Wood v. Zeigler*, 15 Pickle, 515. In that case it was held that a memorandum of a sale of land, which describes the land sold as the "Baldwin Place," without giving the name of the State or county where located, or the name of the owner, is void. So that in our opinion if this contract between Dr. Harris and defendant company be viewed as conveying an interest in land, it is void for insufficient description. But the important inquiry remains whether this instrument does in point of fact convey, or attempt to convey, any interest in land.

Touching the latter proposition Mr. Jones, in his work on Conveyancing, Vol. 1, Sec. 788, says: "Though a covenant be made by one for himself and his assigns, yet if it does not concern the land, his assignee is not bound by it. The covenant in such case is merely collateral."

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At Section 703 the author says: "To create a covenant running with the land, it is essential that with the making of the covenant there be a transfer of title from one party to the other, unless there is the equivalent of a grant of an easement or servitude which may attach to the possession of the land and run with it regardless of any change of ownership. Where one party covenants with another in respect of land, and at the same time, with and as a part of the making of the covenant, neither parts with nor receives any title or interest in the land, nor creates an easement, nor a right in the nature of an easement, for the benefit of the land, such a covenant is at best but a mere personal contract." See Jones on Easements, Sec. 670.

It is conceded by counsel for the company that in order to create a covenant running with the land so as to bind successors in title, two things must concur, namely: First, the covenant to be done or performed must touch and concern the land, and not a thing collateral to the land conveyed. Second, there must be between the original covenantor and covenantee the conveyance of an estate to which the covenant is pertinent, or the creation of an easement equivalent to an estate. It is not insisted by counsel that there was any transfer of title in this case from one party to the other, but the insistence is that there was the

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creation of an easement which was equivalent to an estate. This contention presents the crucial question in the case.

It is contended that this contract between Dr. J. M. Harris and the defendant company creates both an easement in his land in favor of the defendant company and a servitude which attaches to the possession of it. The argument is that since the fence must rest equally on the land of both Harris and defendant company, this fact gives the company an easement in the land of Harris.

It was held in *Sanders v. Martin*, 2 Lea, 215, that "if two adjoining owners build a wall partly on each lot, and by agreement or continuous user for twenty years treat it as a party wall, each has an easement of support for his half."

The position of counsel is that we have here an agreement between Dr. Harris and the railroad company, two adjacent landowners, to build and perpetually maintain a fence on their adjoining lands. Now, in answer to this contention, it is only necessary to refer to the contract, and we find it recited that Dr. Harris desires to build a fence along his (Harris') line, next to said railroad, fifty feet from the center of the track. It does not appear that any part of this fence was to lie on defendant's land, but it was to be built on Harris' line. Hence defendant company thereby acquired no interest or easement in plaintiff's land. In order to create a cove-

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nant running with the land, some interest in the land must pass from the grantor or be created by the covenant.

“If the covenant is not of a nature that the law permits to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of the parties. Where the agreement is nothing more than a simple contract, which in law has no greater force than a license, there is no privity of contract or estate which will authorize a recovery upon it in an action at law. The contract is, in such case, personal or not assignable at law, and the right to enforce it and the liability upon it rests with the parties alone.” Jones on Easements, Secs. 670-674. “If one taking such covenant neither parts with nor receives any interest in the land as a part of the covenant, this is at best merely personal, and does not bind the grantee.” Jones on Easements, Sec. 676.

Whether Dr. Harris, the original owner, might not have been bound by this contract by way of an estoppel, we need express no opinion. The question presented upon this record is whether a purchaser of the land is bound by said contract, and we hold he is not so bound, for the reason that the exemption from liability was merely a personal contract between the original parties, and not a covenant running with the land. The result is the judgment of the Circuit Court is affirmed.

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SAWYERS v. SAWYERS.

108	597
110	156

(Nashville. March 16, 1901.)

1. CHANCERY PLEADING AND PRACTICE. *Reading co-defendant's answers against each other.*

The general rule that the answer of one defendant cannot be read against another is subject to the exception, among others, that any defendant's answer may be read against a co-defendant who claims through or under him. But this exception has no application where the defendant, whose answer is offered against a co-defendant, had, at the time of his answer, parted with all interest in the property involved, and was without interest in the result of the suit, and perhaps not a necessary party, while the co-defendants to be affected asserted title to the property, and were infants whose rights had, by their answer, been committed to the protection of the Court. (*Post*, pp. 598-605.)

Case cited: *Turner v. Collier*, 4 Heis., 95.

2. COURT OF CHANCERY APPEALS. *Effect of findings.*

The finding of the Court of Chancery Appeals that a proposition of fact is or is not sustained, which the law requires to be supported by clear and satisfactory evidence, is conclusive and irreversible in the absence of any showing that the Court did not properly apply the rule as to the *quantum* of evidence. (*Post*, pp. 603, 604.)

3. SUPREME COURT. *Remanding case for proof.*

Where court and counsel erroneously assumed the competency of the answer of one defendant against his co-defendants, and a decree based on such answer was rendered for complainant, this Court, upon reversal of such decree and holding such answer to be incompetent, will remand the cause for the taking of further evidence. (*Post*, pp. 605, 606.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
 ANDREW ALLISON, Ch.

Sawyers v. Sawyers.

WM. G. BRIEN for J. C. Sawyers.

JAMES P. ATKINSON for J. G. Sawyers.

ROBT. O. ALLEN for Guardian *ad litem*.

MORRIS & TURNEY and WM. T. TURLEY for Minors.

WILKES, J. This is a bill to reform and correct a deed made by J. G. Sawyers to his son, the complainant, J. C. Sawyers, and to his wife and minor children.

The bill is filed by the son against his wife, his father, and minor children. The wife and father filed answers in which they admitted the allegations of the bill, and assented to the relief sought. The minors filed a formal answer by their guardian *ad litem*, and submitted their rights and interests to the care of the Court. The Chancellor upon hearing granted the relief sought, and reformed the deed, but not strictly in accord with the prayer of the bill. The decree granting the relief and reforming the deed was entered on August 13, 1894. The minor defendants have now brought the decree and proceedings before this Court upon a writ of error, and the cause has been heard by the Court of Chancery Appeals, which Court reversed the action and decree of the Chancellor and dismissed the bill, denying all relief, and the complainant has appealed to this Court and assigned errors.

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The case as presented by the bill is that J. G. Sawyers, the father, made a deed to J. C. Sawyers and his wife and children on December 25, 1890; that it was his intention to vest the entire interest and a fee simple title in the son, but by mistake of the draftsman of the deed, and unknown to the grantor, J. G. Sawyer, the title was vested in the son and his wife and children as tenants in common, for the life of the son and his wife, or the survivors of them, to be used by them as a home, and the rents and profits to be used by them as a family, with remainder to their children or the issues of their children. The complainant charges that this was done by mistake, and upon the ground of mistake the deed is sought to be reformed and corrected. Some objections to the proceedings were made in the Court of Chancery Appeals, which were disposed of by that Court, and need not be further considered by this Court, and there are virtually but two assignments that are to be considered by this Court. The first assignment we will consider is thus stated:

The Court of Chancery Appeals erred in not finding that the answer of J. G. Sawyers was admissible as evidence, and conclusive upon the minor defendants. The real finding of the Court of Chancery Appeals is that the statements of J. G. Sawyers in his answer are not admissible against the minor defendants as evidence to affect

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their title; but that Court also finds that there is nothing in the record to show that it was specially offered as evidence, but simply that the cause was heard upon the bill, answers, proof, etc. In the same connection that Court reports that the answer could only be regarded as an admission by one defendant, made years after the transaction, and when he had no interest in the land, and no special interest in the controversy. That Court further reports that if this statement had been made in the shape of a deposition with opportunity for cross-examination, it would have been strong evidence for the complainant, and if there was nothing to contradict it, would have been sufficient to establish the fact. But that the admissions of the grantor, J. G. Sawyers, made years after he had parted with the possession of the land, could have no probative effect against the minors to whom his conveyance had given a remainder interest, and that there is no other evidence sufficient to reform the deed.

The contention before us is that the Court did not give the proper weight and probative force to this answer, and that if it had been given its proper effect the case would have been made out for a reformation and correction of the deed.

The general rule in chancery is that the answer of one defendant cannot be read against another. There are, however exceptions to this

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rule. They are laid down in *Turner v. Collier*, 4 Heis., 95, and may be summarized under these heads:

1. Where the co-defendant claims through the person whose answer it is proposed to read.
2. When the co-defendants are jointly interested as partners or otherwise.
3. When the respondent refers in his own answer to that of his co-defendant for further information.

This general rule and exceptions are taken from Greenleaf on Evidence, Vol. 3, page 283. We need only notice the first exception, as manifestly the other two do not apply in the present case.

We think there is, and must necessarily be, a difference in the weight and probative force of an admission in the answer of a co-defendant and the deposition of such co-defendant. In the former case the statement is *ex parte*, and in the latter there is full opportunity for cross-examination and the application of such tests as are practicable to detect the falsity of such statement. In the case of minors who are to be adversely affected the rule should be still more strongly drawn, since an agreement between the plaintiff and defendant solemnly entered into would not be allowed *ipso facto* to prejudice their rights. The strength of such admission must also depend largely upon the circumstances of each case. It may be that there is no antagonism between the

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parties, but their interests and wishes in the matter may be the same. In such case the statement of the defendant can scarcely be called an admission, which implies some concession against the interest of the party making the statement, but it is rather an affirmation or verification of the statement made by the plaintiff. Now, in the present case, the statement made by the father, J. G. Sawyers, was in no sense a concession or admission against his interest or affecting him in any way adversely, as he had long since parted with the possession and title to the property, and had no interest whatever in it. It was not an admission made while he was the owner of that property, but after he had divested himself of all interest in it, and his evident desire appears to be to aid the complainant in his contention; still it was a matter of vital interest and importance to his minor co-defendants, inasmuch as their rights are sought to be swept away by this statement. It can be seen at a glance how important it was to these minors that their co-defendant should be rigidly cross-examined and questioned as to why it was the deed was drawn vesting the children with an interest in the land with so much particularity of detail and nicety of provision, and he could have been asked who wrote the deed, and what instructions were given about writing it, and other details absolutely necessary for the protection of the interests of these minors.

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In Beach on Modern Equity Practice, Sec. 799, it is said: "There can be no valid decree binding the interest of any infant defendant without proof, although his co-defendant and the complainant agree as to the facts." See to the same effect Ency. Pl. & Pr., Vol. 10, p. 689; same, Vol. 1, p. 955.

We need not specially pass upon the assignment of errors that the evidence outside of the answer is not sufficient to warrant the correction. This is a question of the quantum of evidence upon a matter of fact, and comes within the exclusive province of the Court of Chancery Appeals upon the application of proper rules.

These rules are properly formulated by the Court of Chancery Appeals in their statement that the law requires the evidence to be clear and satisfactory in order to justify a reformation or cancellation of a deed for mistake. In the present case, excluding the answer of J. G. Sawyers, the grantor, there is no evidence upon which the Chancellor could have rested his decree except the statements of the two witnesses, J. G. Sawyers and his wife. But one other witness, Jackson, was examined, and he merely testifies that J. C. Sawyers claimed the land, improved it, and was in possession of it for a number of years. Indeed, the Chancellor appears to have based his decree upon the agreement between these parties, as the latter part of the decree recites that it is

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framed as it is, the said J. G., J. C., and Emma A. Sawyers consenting thereto, as the real intention of the parties, it is so ordered and decreed.

Recurring again to the force and effect to be given to the answer of J. G. Sawyers, it is proper to say that it is merely formal and very meager, consisting of only five lines, and stating simply that the allegations of the bill are true, and that he is ready and willing that the title to the property shall be made according to the prayer of the bill.

This answer was filed in August, 1894, or about four years after he had parted with the title to the land in 1890, and when he had no interest whatever in it, no possession or right to its possession.

Mr. Greenleaf, after laying down the general exception that an answer of a defendant may be used as evidence against his co-defendant when the co-defendant claims under the party answering (1 Greenleaf's Evidence, Sec. 178), says: "The admissions which are thus receivable in evidence, must, as we have seen, be those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party.

"Sec. 179. This most just and equitable doctrine will be found to apply not only to admissions made by bankrupts and insolvents, but

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to the case of vendor and vendee, payee and indorsee, grantor and grantee, and generally to be the pervading doctrine in all cases of rights acquired in good faith previous to the time of making the admissions in question." Sec. 180.

The principle is thus announced in Phillips on Evidence, Vol. 1, note 104, pages 255, 259, 262: "All the cases agree that declarations made by the person under whom the party claims after the declarant has parted with his right, are utterly inadmissible to affect any one claiming under him. And this rule applies even though they are sworn admissions in answer to a bill in chancery. *Doyle v. Sleeper*, 1 Dana's Rep., 531.

The competency of the admissions depends upon two matters: First, that they were made while the declarant had an interest; and, secondly, that the party to be affected claims under him. *Reed v. Dickey*, 1 Watts' Rep., 152-154; 2 Phillips on Evidence, p. 61; *Mosely v. Armstrong*, 3 Monroe, 287.

We are of opinion, therefore, that there is no error in the holding of the Court of Chancery Appeals, upon the record as now presented, that a case for reforming the original deed was not made out, and that there was error in the decree of the Chancellor in holding that it was. It appears, however, that Court and counsel were misled into treating the answer of J. G. Sawyers as evidence against the minors, and the de-

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cree of the Court below was heard on this theory, and the decree of the Court of Chancery Appeals will be reversed and so far modified as to direct a remand of the cause to the Court below, to the end that further proof may be adduced to show the mistake made in the original deed, and the right of the complainant, J. C. Sawyers, to have the same changed so as to vest the title as prayed for in the original bill.

The costs of the writ of error and proceedings in this Court will be divided equally.

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116	390

RIDLEY v. HALLIDAY.

(Nashville. March 22, 1901.)

1. CHANCERY COURT. *Jurisdiction to convert realty.*

A Chancery Court has inherently, without the aid, and in the absence of any inhibition, of statute, jurisdiction and power to bind and conclude, by its decree converting realty into personalty, the rights and interests, whether legal or equitable, vested or contingent, present or future, of all persons, whether *in esse* or *in posse*, and whether *sui juris*, or under disability, who are before the Court either by service of process or by "virtual representation," but it must satisfactorily appear that such conversion is for the best interest of all the parties, and the decree must award the several parties the same interests in its proceeds which they enjoyed in the realty, and provide for protection of same.

Cases cited: *Hurt v. Long*, 90 Tenn., 445; *Thompson v. Mebane*, 4 Heis., 370.

2. SAME. *Same. Case in judgment.*

Where lands have been deeded to or in trust for A for life, remainder to his widow and children, and descendants of the latter, and, in default of such, to the children of the grantee and their descendants, a Court of Equity may, upon a bill filed by A and his trustee, representing the life estate, before the birth of any person of the first class of remaindermen, viz.: children of A, against the living children and grandchildren of the grantee, some of whom are infants, pronounce decree declaring that the conversion of such realty into personalty will be for the best interest of all parties--those *in posse* as well as those *in esse*—and converting same accordingly, and awarding and protecting the rights of the parties in the proceeds of the lands, and such decree will be binding upon the unborn children of A, on the theory that they are represented in the litigation by the life tenant.

FROM MAURY.

Appeal from Chancery Court of Maury County.
ANDREW J. ABERNATHY, Ch.

Ridley v. Halliday.

W. C. SALMON for Ridley.

J. C. BRADFORD, E. H. HATCHER and FIGURES
& PADGETT for Halliday.

BEARD, J. In 1895 J. W. S. Ridley, by deed of gift, conveyed to his son, Webb Ridley, a valuable farm of five hundred and eighty acres of land, in the county of Maury, upon the following trusts: That the said Webb Ridley, trustee, should permit and suffer his son, William Ridley, for and during his natural life, to have and receive the rents, incomes, and profits of said lands, and to exercise such control over the use, occupation, renting, and cultivation thereof as he, the said William, might deem proper, but in such way, nevertheless, that such lands, and the rents, incomes, and profits thereof, should not in any way be liable for the debts or contracts of the said William; that upon his, the said William's, death said lands should go to his children, and to the living issue of any deceased child, the issue taking the parent's share; that in case William left a widow surviving, she should have the right to occupy the land during her widowhood, sharing equally with the children, or their issue, the rents, incomes, and profits derived therefrom; that should said William at death leave a widow, but no children or issue of children, the trustee should suffer and permit her to receive and enjoy the income of the lands during her

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life or widowhood, but so as they should not be liable for her debts or contracts, and that at the death or marriage of the widow, the lands should go to the grantor's other children, and to the issue of such of them as might be dead; that should William die leaving no widow or children, or issue of deceased child or children, the said lands should go to the grantor's other living children, or the issue of such of them as might be dead.

In 1898 the defendants, the two Strudwicks, and one Carpenter, made a written proposition to the trustee and the life tenant, in which they agreed to purchase this property at the price of seventy-five dollars an acre, upon the condition that the latter parties would institute proper proceedings in the Chancery Court of Maury County, and procure an acceptance of the same.

Upon receiving the proposition the trustee, Webb, and the life tenant, William P. Ridley, at once filed a bill in that Court, to which all persons in interest, *in esse*, were made parties defendant as follows: Annie Halliday and W. P. Halliday, her husband, and their minor child, W. P. Halliday, Mary P. Ridley, and the infant children of Webb Ridley. Of these defendants Annie R. Halliday and Mary P. Ridley were the children of the donor, J. W. S. Ridley, and the sisters of the trustee, Webb, and the life tenant, William Ridley.

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In this bill, after setting out the deed of gift, the interests created by it, both vested and contingent, and the proposition for its purchase already set out, many reasons were then averred why it was greatly to the interest of all concerned that the same should be accepted. The prayer was that the matter might be referred to the Clerk and Master to take proof whether such sale would be advantageous, and in the event he should report it was, then that it be made. It was also averred that William Ridley, the life tenant, was unmarried, and that he had never had children born to him.

Answers were filed by the adult defendants and by guardians *ad litem* duly appointed for the minors. The answer of the adults conceded that it would be wise to accept the proposition of purchase, while those of the guardians *ad litem* simply craved the protection of the Court for the interest of the minors. The cause then proceeded to a reference to the Clerk and Master, who, after taking much proof, reported that the offer of purchase from the Strudwicks and Carpenter was a very advantageous one, and recommended its acceptance by the Court. This report was unexcepted to, and the Chancellor entered a decree of confirmation, and at the same time made provision for the investment of the money received for the purchase of the property, so that the interests of all parties, born and unborn, might

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be preserved in the fund as they existed, under the deed, in the land itself. From this decree a writ of error has been duly prosecuted.

No question was made in the Court below by demurrer, or otherwise, as to the jurisdiction of the Chancery Court to grant the relief sought by the bill. While if that Court had been absolutely lacking in jurisdiction of the subject-matter of the cause, then jurisdiction would not have been conferred by this failure to make an objection, by pleading, at the proper time (*Richards v. L. S. & M. S. Ry. Co.*, 124 Ill., 516), still as a Chancery Court has unquestionably the power in a proper case, where it has the proper parties before it to convert realty into personalty (*Ruggles v. Tyson*, 104 Wis., 500; *Gavin v. Curtin*, 171 Ill., 641), a failure to make objection by some preliminary pleading is a waiver of objection that the Court is without jurisdiction to proceed in the cause.

But not only no jurisdictional objection was taken in the Court below, none is made here. To the contrary, the power of the Court to decree the conversion of the realty into money under the conditions averred in the bill and established by the evidence, was conceded there, and is equally conceded in this Court. The only question made upon this appeal and by assignment of error is, that as the record shows that the life tenant, William Ridley, was unmarried and without chil-

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dren, that the decrees pronounced would not bind such children should they hereafter be born to him, upon his possible future marriage, the contention of the appellants being that they are without virtual representation in the case. This insistence rests in part upon § 5086 of the (Shannon's) Code, and in part upon the rule of jurisprudence so generally recognized that no one is bound by a judgment or decree, save parties to the record regularly served and their privies.

What may be the proper construction of this Code section we think it unnecessary to determine in this cause. It is one of the sections of Chapter 3 of Title 2 of Part III. of the Code. This chapter is entitled "Of the Sale of Property of Persons under Disability," and the body of the chapter is in keeping with the title. Section 5072 (this being the first section of the chapter) provides that "the Court of Chancery may, for and on behalf of persons laboring under the disability of coverture and infancy, consent to and decree a sale of the property . . . of such persons under the provisions of this chapter," while Section 5073 provides that this "application may be made by bill or petition filed by the husband or regular guardian, to which the person under disability is a defendant, to be represented by next friend or guardian *ad litem*," etc.

The present bill is not filed within these statutory provisions. It is not filed either by a

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husband of a married woman asking a sale of her property, or by a guardian of minors seeking the same relief as to theirs. It is that of a trustee and life tenant, who, bringing all the contingent remaindermen *in esse* into Court, and averring the necessity of such relief, ask that real estate in which these parties have a contingent interest be sold by order of Court, and that its proceeds be held subject to the trusts imposed upon the realty. The bill being outside these provisions must rest upon the inherent power of a Chancery Court to grant such relief, and by its decree for conversion bind parties who may hereafter come into existence.

There is no doubt that if there had been in being, and made a party by proper process to this cause, one of the first class of contingent remaindermen provided for in the trust deed, the decree would have bound all other members of the class who subsequently came into being. That result follows from the doctrine of representation, it being assumed that the living representative would look after the interests of the entire class by bringing to the attention of the Court the merits of the controversy, so far as they affected the class. But in the absence of a member of such class, can the decree herein pronounced carry the whole title to the purchasers? This was the purpose in filing the bill, and if it fails in this respect the failure is absolute.

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It has been held by a large majority of the Courts, both English and American, that in certain cases the life tenant will represent contingent remaindermen where no one of the latter is *in esse* at the time the Court is called upon to intervene with regard to the estate in controversy.

In *Finch v. Finch*, 2 Vesey, Sr., 492, in passing upon the rule of virtual representation as applied to the sale of lands limited in remainder, under a bill to execute trusts, Lord Hardwick said: "It is admitted to be necessary to bring in the first person entitled to the remainder and inheritance of the estate, if such is in being. It is true, if there is no such person in whom the remainder of the inheritance is vested in being, then it is impossible to say the creditors are to remain unpaid, and the trust be not executed until a son is born. If there is no first son in being, the Court must take the facts as they stand. It would be a very good decree, and no son born afterward could dispute it unless he could show fraud, collusion, or misbehavior in the performance of the trust."

In *Leonard v. Lord Sussex*, 2 Vernon, 527, there was a tenant for life with remainder to his sons. The tenant for life, before he had a son born, brought a bill against the trustees, in whom the title was vested, for an account which

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was decreed, and it was held that the account should stand and be binding upon the sons.

In *Gaskell v. Gaskell*, 6 Simons, 643, there was a tenant for life with remainder to his first and other sons in tail of an undivided moiety of certain estates. The tenant for life before a son was born to him filed his bill against his co-tenants for partition. Objection was made that the complainant then had no issue in being. But the Vice Chancellor (Shadwell) in overruling this objection said the Court had frequently decreed partition under such circumstances, and that a decree for partition in that case would be binding upon the tenant in tail when he came into being.

In *Gifford v. Hart*, 1 Scho. & Lef., 408, Lord Redesdale announced the rule thus: "Courts of Equity have determined on grounds of high expediency that it is sufficient to bring before the Court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life. . . . Where all the parties are brought into Court, and the Court acts on the property according to the rights that appear without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be a tenant for life, remainder to his first son in tail, remainder over, and he is brought before the Court

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before he has issue, the contingent remaindermen are bound. This is now considered a settled rule of Courts of Equity, and of necessity."

Perhaps no one in the history of equity jurisprudence can more properly be said to be a master of the rules and practice of the English Chancery Courts. Before his elevation as John Mitford he had published a work on "Equity Pleading and Practice," which is regarded as a valuable text-book by the profession to this day. In that work he embodied the rule of virtual representation which he subsequently annourced in the case last cited.

Turning to the cases determined by American Courts, with the exception of the Supreme Court of North Carolina, we find them holding the same rule. In *Cheeseman v. Thorne*, 1 Edw. Chy., 629, the Vice Chancellor held that the partition proceedings in that case would bind afterborn remaindermen under the authority of *Wills v. Slade*, 6 Vesey, Jr., 498, even without the aid of statute.

In *Kent v. Church*, 136 N. Y. (S. C., 18 L. R. A., 334), in the course of its opinion the Court said: "Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to

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deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience and almost necessity. The rights of persons unborn are sufficiently cared for if when the estate shall be sold under a regular and valid judgment its proceeds take its place, and are secured in same way for such persons."

The case of *Gavin v. Gavin*, 171 Ill., 640 (S. C., 40 L. R. A., 777), is directly in point. The complainant in that case, under the will of her father, was tenant for life, with remainder in fee to her children, or to the issue of any of these children dying during the existence of the life estate, and in the event of her death without children or the issue of such, then remainder over to the testator's sons. Before the birth of any child the life tenant filed a bill for the conversion of this real estate, stating strong equitable grounds therefor, and made as the only defendants thereto her brothers, who were contingent remaindermen of the second class. It was held that the bill was maintainable, and that the decree for sale of necessity would bind her after born children.

In addition we refer to *Ruggles v. Tyson*, supra; *Sweet v. Parker*, 22 N. J. E., 454; *Baylor v. Dejarnette*, 13 Gratt., 152; *Faulkner v. Davis*, 18 Gratt., 651; *McArthur v. Scott*, 113 U. S., 391.

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The authors of works on Equity Pleading and Practice, so far as we have examined, with singular unanimity adopt the same view. Reference is here made to Mitford on Eq. Pl. & Pr., *supra*; Calvert on Parties, 49-53; Tyler on Parties, 24; Story's Equity Pleading, Sec. 145. In the section referred to Judge Story says: "Doubts were formerly entertained whether in suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. That doubt, however, is now removed, and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases."

It is true that this statement of the rule by the author is by its terms limited to cases in partition, but as we have already seen it was applied in *Leonard v. Lord Saxon*, *supra*, in the matter of account, and to the enforcement of a trust in favor of creditors by a decree for the sale of lands. *Finch v. Finch*, *supra*. No sound reason has been, or so far as we can discover, can be suggested why it should not apply in any other proceeding where a Court of Equity is exercising its jurisdictional power in disposing of real estate, the title to which is embarrassed by contingent remainders awaiting unborn remaindermen. If in the one class of cases necessity

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requires an application of the doctrine of virtual representation, why should it not be as operative in the latter? We have held that without the aid of the statute already referred to, a Court of Equity, in proper cases, has the inherent power to convert, for the benefit of minors, realty into personalty. *Hurt v. Long*, 90 Tenn., 445; *Thompson v. Mehane*, 4 Heis., 370. In such a case could there be found any solid ground for distinguishing it, so far as this matter of representation is concerned, from a case of mere partition? We think not. If in the case of partition and of the conversion of the property of infants, falling within the inherent jurisdiction of Courts of Equity, then why not in every case, where the nature of the trusts and the situation of the property make it eminently judicious if not absolutely essential, in the interest of all persons *in esse* as well as *in posse*, that a conversion should take place?

In each case it is essential that the interest of the contingent remaindermen in the proceeds of the converted property be preserved by the decree directing the conversion. *Monarque v. Monarque*, 80 N. Y., 320. This being done we see no good reason why the rule of virtual representation should not apply. Even if the limitation or qualification suggested in Calvert on Parties, page 52—that is, “that except under very particular circumstances no tenant for life should be capable

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of maintaining the suit, unless he were one to whose issue there was a remainder in tail"—is to prevail, the present case would fall within its spirit. For here the contingent remaindermen whom the tenant for life represents are not remaindermen in tail, yet they are children who may be born to him, and the children of such as may die during his life.

We have examined the cases from North Carolina referred to in the able and exhaustive brief of the counsel for appellants, and while they are entitled to great consideration, we think they are overborne by the weight of authority. There is nothing in our own cases to exclude us from the rule we have already indicated, and we think that its adoption is consistent with sound policy, and when applied under proper restrictions will work to the advantage of all interests involved.

Before concluding, it is proper to say that upon the authorities it is immaterial whether in such a case the bill is brought by or against the tenant for life. *Gaskell v. Gaskell*, supra; *Hale v. Hale*, 146 Ill., 257; *Leonard v. Sussex*, supra; Story's Eq. Pl., Sec. 145.

The decree of the Court of Chancery Appeals is affirmed.

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INSURANCE CO. v. CRAIG.

(*Nashville*. March 22, 1901.)

1. **ACTION.** *Against State.*

The express declaration of the Constitution that "suits may be brought against the State in such manner and in such Courts as the Legislature may by law direct," carries with it a positive implication that they shall not be brought otherwise, or at all, unless legislative authority therefor be affirmatively given. (*Post*, pp. 628-630.)

Constitution construed: Art. I., Sec. 17.

2. **SAME.** *Against Insurance Commissioner is not against State.*

An action brought by an insurance company against the Commissioner of Insurance, to restrain a threatened revocation of its license, is not one that is prosecuted "with a view to reach the State, its treasury, funds, or property," and therefore not within the prohibition of the statute forbidding the Courts to entertain jurisdiction of suits against the State or its officers. (*Post*, pp. 628-630.)

Code construed: § 4507 (S.); § 3507 (M. & V.); §§ 2807, 2807 a (T. & S.).

3. **INSURANCE.** *Object and construction of insurance statutes.*

The chief object of the statutes creating an insurance department, and placing a commissioner at the head of it to administer its affairs, is to protect policy holders, and these statutes should be construed with that object in view. (*Post*, p. 645.)

4. **SAME.** *Powers of Insurance Commissioner.*

The powers of the Commissioner of Insurance, with reference to granting, refusing, and revoking licenses of insurance companies conferred by our statutes, are discretionary and judicial. His decision of any question that lies within the scope of his authority, as defined by statute, will not be reviewed by the Courts. It is final and conclusive. But his determination that any matter lies within the scope of his statutory authority is

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subject to review by the Courts, and, if erroneous, will be vacated or arrested. (*Post*, pp. 640-643.)

Code construed: §§ 3274, *et seq.*, (S.).

Act construed: Acts 1895, Ch. 160.

Case cited: *State v. Thomas*, 88 Tenn., 495.

5. SAME. *Same. Case in judgment.*

The Commissioner of Insurance has power, under our statutes, to revoke, and he will not be enjoined by the Courts from revoking the license of a foreign insurance company that undertakes to utterly repudiate, and persists in its utter repudiation of its contract, represented to the commissioner and policy holders as unconstitutional, to reinsure all the risks or policies of another foreign insurance company, numbering several hundred in this State, on the ground that the contract between the two companies was conditioned upon performance of certain things by the reinsured company, in which it had defaulted. The commissioner's authority for such action will be found in those general provisions of the statutes which empower him to revoke the license of any foreign insurance company that "has failed to comply with the law," or that "shall violate or neglect to comply with any provision of law obligatory upon it." (*Post*, pp. 643-650.)

Act construed: Acts 1895, Ch. 160, Secs. 5, 12,

6. SAME. *Same. Meaning of clauses authorizing revocation of license.*

The Commissioner of Insurance is authorized by the above-quoted general provisions to revoke the license of foreign insurance companies, not only for failure or neglect to comply with the requirements of the statute laws, but for failure and neglect to comply with the broader obligations of the common law that go to the general integrity of their business and affect all policy-holders in the same way. (*Post*, pp. 643-650.)

Act construed: Acts 1895, Ch. 160, Secs. 5, 12.

7. INJUNCTION. *Not allowed against public officer, when.*

The rule is so general and obvious as to be almost axiomatic, that a public officer, clothed with discretionary or quasi-judicial power, as contradistinguished from mere ministerial duty, cannot be coerced by mandamus or restrained by injunction in the exercise of his judgment under that power; otherwise the Court would substitute its judgment for his, which is not per-

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missible. The Courts will inquire whether such officer has exceeded his power, or has acted under an unconstitutional statute, and restrain him, in a proper case, if he has done so. (*Post*, pp. 639, 640.)

Case cited: *Lynn v. Polk*, 8 Lea, 121.

8. MANDAMUS. *Allowed against public officer, when.*

If the law plainly prescribes a specific act, which is due in point of time, but has been refused on demand, if simply affecting a private right, or only omitted if of public concern, the Court will interpose, at the instance of the proper party, and by mandamus set such officer in motion, leaving him, however, the free exercise of his own judgment and discretion in the manner of performance. (*Post*, p. 640.)

Cases cited: *Turnpike Co. v. Marshall*, 2 Bax., 122; *State v. Miller*, 1 Lea, 606; *Morley v. Powers*, 5 Lea, 698.

9. CORPORATIONS, FOREIGN. *Statutes of.*

A corporation is an artificial person created by law, and possessed of only such powers and rights as its charter confers. It has no inherent migratory power, and can receive none from the sovereignty of its creation that will be effective in other sovereignties. Its recognition in another government is always a matter of pure comity, and never a matter of absolute right. Consequently, a corporation created by one country or State can enter another country or State, and conduct its business there, only by the latter's permission, and only on such terms and conditions as it may see fit to impose. Any State may, in its discretion, entirely exclude corporations of other States and countries from doing business within its borders, or it may admit them under restrictions, and with the exaction of security for the faithful performance of their contracts with citizens. (*Post*, pp. 630, 631.)

Cases cited: *Ins. Co. v. Ins. Co.*, 11 Hum., 25; *Young v. Ins. Co.*, 85 Tenn., 196; *State v. Phoenix Ins. Co.*, 92 Tenn., 420; *Dugger v. Ins. Co.*, 95 Tenn., 246; *State, ex rel., v. Schlitz Brewing Co.*, 104 Tenn., 752.

10. SAME. *Same.*

After foreign corporations have been admitted the State may revoke their authority to do business, and expel them from its borders whenever it chooses, and upon whatever ground and through whatever agency the Legislature may prescribe. The authority resulting to them from the mere grant of ad-

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mission never has the sanction of legal right, but that of comity merely; and from the very nature of the act the government must always be held to have an implied, if not an express, power of revocation. (*Post*, p. 631.)

Case cited: *State, ex rel., v. Schlitz Brewing Co.*, 104 Tenn., 715.

11. SAME. *Same.*

A corporation is a "person" within that clause of the fourteenth amendment to the Federal Constitution, which forbids deprivation of "life, liberty or property without due process of law," but is not a "citizen" within the provision of the same amendment forbidding the abridgment of the "privileges or immunities of citizens of the United States," nor within the meaning of that other clause of the Federal Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." (*Post*, pp. 631, 632.)

Case cited: *Harbison v. Iron Co.*, 103 Tenn., 422.

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. Cook, Ch.

LELIXETT & BARR for Insurance Co.

Attorney-general PICKLE for Craig.

CALDWELL, J. This cause stands on bill and demurrer. The complainant, The North British and Mercantile Company, of Edinburg and London, alleges that it is a corporation chartered and organized under the laws of Great Britain, with authority and power to conduct the business of fire insurance in that dominion and in the vari-

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ous States and territories of the United States of America; that it now is, and for years has been, conducting that business in those States and territories under the authority of their respective laws; that it has annually, for several successive years, including the present year 1900, complied with all the laws of Tennessee, and, at great expense, established a business in this State that is now yielding it an income, from premiums, of more than \$40,000 per annum; that on April 27, 1900, the complainant entered into the following contract with the Traders' Fire Insurance Company of New York, namely:

“In consideration of \$1 (one dollar), the receipt of which is hereby acknowledged, and a further payment of ten thousand dollars (\$10,000) before twelve o'clock noon, on Saturday, April 28th, the North British and Mercantile Company, of Edinburg and London, hereby agrees, through its United States manager, to assume the fire risks of The Traders' Fire Insurance Company, of New York, from six o'clock p.m., April 27, 1900, not otherwise reinsured.

“A further payment on account of twenty-five thousand (\$25,000) dollars, to be paid on or before May 1, and the balance due, namely, the net unearned premiums on outstanding policies, less 15% commission thereon, to be paid upon com-

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pletion of schedules, and at least within thirty (30) days from date hereof.

"This contract to be null and void unless payments as above stated are duly made.

"This temporary agreement to be replaced by a final contract of like terms and conditions, when the total amount due hereunder is determined as per schedules. Schedules to be completed as soon as practicable."

That it thereafter wrote the former representative of The Traders' Fire Insurance Company in Tennessee, as follows:

"UNITED STATES BRANCH,
"NORTH BRITISH & MERCANTILE INSURANCE COMPANY,
"54 William Street,

"NEW YORK, May 9, 1900.

"*Colburn's Insurance Agency, Chattanooga, Tenn.:*

"GENTLEMEN—Referring to Traders' Policy No. 11,258, Julia Gottschalk, expiring May 16, 1902, which with the remaining outstanding business of the Traders' has been reinsured by the North British and Mercantile Insurance Company, we should prefer to cancel this line, which we trust will cause you no inconvenience. If you will kindly send policy to this office, we will see that you are credited with the proper return premium.

"Yours very truly,

"(Signed) EVERETT U. CROSBY,

"*General Agent.*"

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That, after the expiration of various extensions, The Traders' Fire Insurance Company finally made default in the payment of the consideration for the aforesaid contract of reinsurance, and in consequence thereof the complainant, on August 3, 1900, declared the contract null and void, and gave written notice of the fact to that company and "the various other parties at interest;" that some time after that notification, and notwithstanding the complainant's nonliability "on the said contract to either the Traders' Fire Insurance Company or its policy holders," the defendant sent it a communication in these words and figures, viz.:

"DEPARTMENT OF INSURANCE,

"STATE OF TENNESSEE,

"NASHVILLE, August 21, 1900.

"*North British and Mercantile Insurance Co. of London,*
No. 54 William Street, New York, N. Y.:

"GENTLEMEN—I am informed that you deny liability on policies of Traders' Insurance Company held by residents of Tennessee. I hold that the notice of General Agent Crosby addressed to W. J. Colburn & Company, of Traders', under date of May 9, 1900, of which policy holders in Tennessee were notified, waives any provision that may have been contained in reinsurance contract between yourselves and the Traders' Insurance Company. I therefore notify you that unless liability on said Traders' policies in Tennessee is acknowl-

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edged within ten days from date, your authority to transact business herein will be revoked.

“Yours very respectfully,

“(Signed) E. B. CRAIG,

“*Insurance Commissioner.*”

Before the expiration of the time specified in that communication this bill was filed to restrain the Insurance Commissioner, by injunction, from making the proposed revocation, and to prevent what complainant alleges will otherwise be an irreparable injury to its good name and business in this State and elsewhere.

As against the defendant's communication the complainant charges that he has no authority or jurisdiction as Insurance Commissioner, or otherwise, to determine complainant's liability on policies issued by the Traders' Fire Insurance Company to Tennessee holders; nor to revoke complainant's license to do business in this State for the causes mentioned by him.

The grounds of demurrer are (1) that the complainant's action cannot be maintained, because it is, in legal effect, a suit against the State; and (2) that the defendant, as Insurance Commissioner, has authority and jurisdiction under the law to revoke the license of the complainant for the reasons stated by him, and cannot properly be restrained by injunction from the exercise thereof according to his discretion.

The Chancellor overruled the demurrer and granted

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the defendant an appeal. The Court of Chancery Appeals affirmed the decree of the Chancellor, and the defendant has appealed again.

The express declaration of the Constitution that "suits may be brought against the State in such manner and in such Courts as the Legislature may by law direct" (Art. I., Sec. 17, last clause), carries with it a positive implication that they shall not be brought otherwise, or at all unless legislative authority therefor be affirmatively given.

The direction of the General Assembly on this subject is found in § 4507 of Shannon's Code, which is as follows:

"No Court in the State of Tennessee shall have any power, jurisdiction, or authority to entertain any suit against the State, or against any officer of the State, acting by authority of the State, with a view to reach the State, its treasury, funds, or property, and all such suits shall be dismissed as to the State, or such of its officers, on motion, plea, or demurrer of the law officers of the State or counsel employed for the State."

This is not a suit against the State *eo nomine*; nor is it a suit against an officer of the State in such sense and for such purpose as to be within the inhibition of the statute. It is a suit against the officer of the State, the defendant being that State's official representative, as Insurance Commissioner, under the Insurance Act of 1895;

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but it is not brought "with a view to reach the State, its treasury, funds, or property," and, consequently, is not of the inhibited class.

The second assignment of demurrer takes a broader range, and requires a more elaborate consideration.

A corporation is an artificial person, created by law and possessed of only such powers and rights as its charter confers. It has no inherent migratory power, and can receive none from the sovereignty of its creation that will be effective in other sovereignties. Its recognition in another government is always a matter of pure comity and never a matter of absolute right; consequently a corporation created by one country or State can enter another country or State and conduct its business there only by the latter's permission, and only on such terms and conditions as it may see fit to impose. Any State may, in its discretion, entirely exclude corporations of other States and countries from doing business within its borders, or it may admit them under restrictions, and with the exaction of security for the faithful performance of their contracts with its citizens. *Dartmouth College v. Woodward*, 4 Wheaton, 636; *Bank of Augusta v. Earle*, 13 Peters, 588; *Paul v. Virginia*, 8 Wallace, 168; *Liverpool Insurance Company v. Massachusetts*, 10 Wallace, 566; *Hooper v. California*, 155 U. S., 648; *Orient Insurance Co. v. Daggs*, 172 U. S., 566; *Waters-Pierce Co. v. Texas*, 177 U. S., 28;

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Ohio Life Insurance Co. v. Merchants Ins. Co., 11 Hum., 25; *Young v. South Tredegar Iron Co.*, 55 Tenn., 196; *State v. Phoenix Ins. Co.*, 92 Tenn., 420; *Dugger v. Insurance Co.*, 95 Tenn., 246; *State, ex rel., v. Schlitz Brewing Co.*, 104 Tenn., 752.

And, though once admitted, the State may revoke their authority and expel them whenever it chooses, and upon whatever ground and through whatever agency the Legislature may prescribe. The authority resulting to them from the mere grant of admission never has the sanction of legal right, but that of comity merely; and from the very nature of the act the government must always be held to have an implied if not an express power of revocation.

Notable instances of a State's rightful and approved exercise of this power are found in the anti-trust statutes recently considered and upheld in *Waters-Pierce Co. v. Texas*, 177 U. S., 28, and *State, ex rel., v. Schlitz Brewing Co.*, 104 Tenn., 715.

Although a corporation is a "person" within the meaning of that part of Section 1 of the fourteenth amendment to the Constitution of the United States which forbids the deprivation of "life, liberty, or property without due process of law" (*Railway v. Ellis*, 165 U. S., 154; *Harbison v. Knoxville Iron Co.*, 103 Tenn., 422), it is not a "citizen" within the meaning of that

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part of the same section which forbids the abridgment of "the privileges or immunities of citizens of the United States" (*Orient Insurance Co. v. Daggs*, 172 U. S., 557), nor within the meaning of the first clause of Section 2 of Article 4 of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." *Paul v. Virginia*, 8 Wal., 168.

As a condition precedent to admission into this State, foreign corporations are required to have their charters registered in the office of the Secretary of State, and abstracts thereof in the counties in which they desire to transact business. Acts 1877, Ch. 31; Acts 1891, Ch. 122: Shannon's Code, §§ 2545, 2546.

These requirements apply to foreign insurance companies (*State v. Phoenix Ins. Co.*, 92 Tenn., 420), and many other exactions are made of them by Chapter 160 of the Acts of 1895, carried into Shannon's Code in § 3274 *et seq.* This Act relates alone to the subject of insurance, and includes in its provisions all nonassessment companies, life and fire, foreign and domestic. The third section makes the Treasurer of the State Insurance Commissioner *ex officio*, and enacts that he, in the latter capacity, "shall exercise the powers and perform the duties conferred and im-

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posed on him by this Act, or by any other law of this State.”

The second section defines a nonassessment insurance contract, and declares it “unlawful” for any person to make one “except as authorized under the provisions of this Act.”

Section 14 requires every nonassessment company, desiring to do business in this State, to obtain from the Insurance Commissioner a yearly “certificate of authority for every agent;” and Section 4 says: “That before granting certificate of authority to an insurance company to issue policies or make contracts of insurance, the Insurance Commissioner shall be satisfied, by such examination and evidence as he sees fit to make and require, that such company is duly qualified under the laws of the State to transact business herein.”

Other sections enumerate various things which all companies are to do as prerequisites to the issuance of certificates of authority, more being required of all foreign companies than of domestic companies (Sec. 9), and more of those chartered in foreign countries (Sec. 10) than of those chartered in other States of the Union.

As to the fact of compliance or noncompliance with these requirements, and all other facts touching the question of qualification to do business in this State, the Insurance Commissioner is, by those parts of Sections 3 and 4 just quoted,

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constituted the exclusive judge, and the required certificates of authority can be lawfully issued only when he is "satisfied" of such qualification.

Not only does the Act confer upon the Insurance Commissioner exclusive authority, in the first instance, to grant or refuse the requisite permission to do business in this State, but it also clothes him with power to withdraw that permission after it has been granted, to revoke certificates of authority after issuance.

Some of the grounds of revocation are separately and specifically stated, while others are included collectively in general expressions, as will be seen from the language following:

"SEC. 5. That if the Insurance Commissioner is of opinion, upon examination or other evidence, that a foreign insurance company is in an unsound condition; or, if a life insurance company, that its actual funds, exclusive of its capital, are less than its liabilities; or if a foreign insurance company has failed to comply with the law, or if it, its officers or agents, refuse to submit to examination or to perform any legal obligations in relation thereto, or fail to pay any final judgment against it by a citizen of the State, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notification thereof to be published in one or more newspapers of general circulation, and no new business shall thereafter be done by it or its agents

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in this State while such default or disability continues, nor until its authority to do business is restored by the Insurance Commissioner; *Provided, however,* that unless the ground for revocation or suspension relates only to the financial condition or soundness of the company, or to a deficiency in its assets, he shall notify the company not less than ten days before revoking its authority to do business in this State, and he shall specify in the notice the particulars of the supposed violation. If, upon examination, the Insurance Commissioner is of opinion that any domestic insurance company is insolvent, or has exceeded its powers, or has failed to comply with any provision of the law, or that its condition is such as to render its further proceedings hazardous to the public or to its policy holders, he shall apply to a Court of competent jurisdiction, through the Attorney-general for the State, to issue an injunction restraining it, in whole or in part, from further proceeding with its business. . . .

“SEC. 12. That the authority of a foreign insurance company may be revoked if it shall violate or neglect to comply with any provision of law obligatory upon it, and whenever in the opinion of the Insurance Commissioner, its condition is unsound, or its assets above its liabilities, exclusive of capital and inclusive of unearned premiums, as provided in section 8, are less than the

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amount of its original capital or required unimpaired funds.

"SEC. 19. That each and every foreign insurance company doing business under the provisions of this Act shall, in January and July of each year, report, under oath of the president and secretary, or other chief officer of such company, to the Insurance Commissioner, the total amount of gross premiums received in this State within the six months next preceding the first of January and July, or since the last return of such premiums were made by such company; and shall, at the same time, pay into the treasury of the State the sum of two dollars and fifty cents (\$2.50) upon each one hundred dollars of said gross premiums so ascertained, which shall be in lieu of all other taxes. And any company failing or neglecting to make such returns and payments promptly and correctly shall forfeit to the State, in addition to the amount of said taxes, the sum of five hundred (\$500) dollars; and the company so failing or neglecting for sixty (60) days shall thereafter be debarred from transacting any business of insurance in this State, until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in the State. Domestic insurance companies shall, at the same time, and in the same manner, pay one dollar and

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fifty cents (\$1.50) on each one hundred (\$100) dollars of gross premiums received on policies issued in this State, and be subjected to the penalties provided for foreign companies.

"SEC. 34. That any insurance company that neglects to make and file its annual statement in the form and within the time provided by Section 16, shall forfeit one hundred (\$100) dollars for each day neglected, and upon notice by the Insurance Commissioner to that effect, its authority to do new business shall cease while such default continues. . . .

"SEC. 41. . . . Should the fact at any time come to the knowledge of the Insurance Commissioner that any insurance company designated in any license issued by him is not solvent, he shall revoke and cancel the license in so far as it authorizes the broker to contract with that company; and, on notice from the commissioner, it shall be the duty of the broker to whom it was issued to present it forthwith for such cancellation.

"SEC. 48. That should any company having issued an insurance policy or policies under this Act fail to pay any final judgment obtained in this State upon any loss or damage sustained by the insured within thirty days after rendition thereof, it shall be the duty of the Insurance Commissioner to recall and cancel the licenses of all brokers to negotiate and place insurance with such

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company on property in this State. All insurance brokers doing business in this State under the provisions of this Act shall have printed in large letters across the face of each policy the following words: 'This company has no deposit and no agents in Tennessee.' Any insurance broker violating this provision shall have license to do business in this State revoked by the Insurance Commissioner."

Speaking generally, the Act continues and enlarges what may properly be denominated a department of insurance for the State, and makes the Insurance Commissioner its legal head or chief executive and administrative officer, with large discretionary or *quasi* judicial functions in reference to both the original grant and the subsequent revocation of business licenses to insurance companies. Granting certificates of authority in the first instance, or revoking them afterwards, necessarily involves the exercise of official judgment and discretion on the part of the Insurance Commissioner. Similar powers conferred by a former Act were characterized as discretionary and judicial in *State v. Thomas*, 88 Tenn., 495.

In some instances the revocation should be immediate, while in others it can be made only after due notice. If the Insurance Commissioner "is of opinion" that a foreign insurance company is in an unsatisfactory condition financially, he should revoke its license at once, but if he con-

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templates a revocation on any other ground, he must give at least ten days' notice, specifying therein "the particulars of the supposed violation;" or if it be a domestic company that is disqualified, he must resort to some Court of competent jurisdiction for an injunction. Sec. 5.

The alleged disqualification of the complainant not relating to its financial condition, the defendant, as Insurance Commissioner, rightly gave ten days' notice of the proposed revocation, reciting the reasons therefor. Complainant tacitly concedes that the defendant has some power of revocation, but denies that he can revoke for the reasons stated in the notice. Defendant affirms his power to revoke for those reasons, and disputes the right of the complainant to control his action in the matter by injunction.

The rule is so general and obvious as to be almost axiomatic, that a public officer clothed with discretionary or *quasi* judicial power, as contradistinguished from mere ministerial duty, cannot be coerced by mandamus, or restrained by injunction in the exercise of his judgment under that power; otherwise the Court would substitute its judgment for his, which is not permissible. High's Extra. Leg. Rem. (3d ed.), Sec. 42; 2 Story's Eq. Jur. (10th ed.), Sec. 955a; *Avery v. Job.* (Oregon), 1 Am. & Eng. Dec. in Eq., 73; Appeal of Delaware County, 119 Penn. St., 159;

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Board of Liq. v. McComb, 92 U. S., 541; *Pennyroyer v. McConnaughy*, 140 U. S., 13.

If the law plainly prescribes a specific act, which is due in point of time, but has been refused on demand, if simply affecting a private right, or only omitted if of public concern, the Court will interpose at the instance of the proper party and by mandamus set such officer in motion, leaving him, however, the free exercise of his own judgment and discretion in the manner of performance (High's Extra. Leg. Rem., Secs. 34, 36, and 41; *Turnpike Co. v. Marshall*, 2 Bax., 122; *State v. Miller*, 1 Lea, 606; *Morley v. Powers*, 5 Lea, 698); or if he assumes to act without lawful authority (as, under an unconstitutional act, *Lynn v. Polk*, 8 Lea, 121), a Court of Equity will restrain him by injunction to prevent irreparable injury. Throop on Public Officers, Sec. 842; Gibson's Ch. Pr., Sec. 707; Hilliard on Inj., p. 374; 2 High on Inj., pp. 862, 868; *Greene v. Munford*, 5 R. J., 475; 2 Story's Eq. Jur., Sec. 955a; 3 Pom. Eq. Jur., Sec. 1345; 3 Am. & Eng. Dec. in Eq., 556; *Board, etc., v. McComb*, 92 U. S., 541.

However, where the official is authorized by an effective law to do or not to do a given thing upon his own investigation or otherwise, the Courts cannot coerce or restrain his action in reference thereto, but must permit him, in the sphere which

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the law has assigned to him, to exercise a free and untrammelled judgment and discretion.

It is even his prerogative, in the first instance, to construe the law under and within which he acts, and the Courts, although of the opinion that his construction is incorrect, will not interfere by mandamus or injunction. *Decator v. Paulding*, 14 Pet., 515; *American Casualty Ins. and Sec. Co. v. Tyler*, 60 Conn., 448.

The rule of noninterference, on the part of the Courts, with the free exercise of discretionary functions by public officials has been applied in cases too numerous to mention. Some of them are cited in Sections 43 to 46, inclusive, of High's Extra. Leg. Rem. One of those sections is particularly apposite. It is as follows:

"SEC. 44c. Under the legislation of many of the States the duty is intrusted to the State officers of examining the affairs of domestic or foreign insurance companies, and of granting licenses to such companies authorizing them to transact business within the State, if in the judgment of such officers the companies have complied with the requirements of the law, and their condition is such as to entitle them to a license. The general rule denying relief by mandamus to control the action of public officials, when such action involves the exercise of judgment or discretion upon their part, is uniformly applied in this

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class of cases. Whenever, therefore, State officers are invested with discretionary powers, requiring the exercise of their official judgment, either in granting, refusing, or revoking licenses to foreign or domestic insurance companies, authorizing them to transact business within the State, their action will not be controlled by mandamus, and the writ will not go to compel them either to issue or to revoke one already issued. And this is true, even though the judgment of the Court as to the construction of the statutes under which such license has been refused may differ from that of the officer, since the Courts will not by mandamus substitute their own judgment for that of public officers who are charged by law with the performance of a duty requiring the exercise of judgment and discretion on their part."

But, it must always be remembered that the public functionary of the class under consideration can act independently of the Courts only to the extent that the law gives him that power. The law is the source of his authority, and he has no discretion beyond that conferred. All of his acts must be within the limits of that authority, and of this the Courts must finally judge. Though he may undoubtedly and in every instance construe the law for himself as to discretionary matters actually within the law, he cannot by interpretation, however conclusive to his own mind, bring within his discretion any matter that is not

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in fact so placed by the law when rightly interpreted by the Courts. His domain is prescribed by the law, and within that domain the discretion given him is beyond the control of the Courts; however, it is the province of the Courts to determine the limits of that domain and keep him within its real bounds and to construe the law and define the limits of his authority in all proper cases.

Then, it is the province of this Court, and not that of the Insurance Commissioner, to determine finally whether or not the action proposed by him, in the present instance, is within the scope of his authority. The Act gives him extensive power of revocation. That power is in a large degree discretionary, and hence beyond extraneous control; but it is not unlimited. It does not include the right to revoke the license of a company when it shall come to the knowledge of the Insurance Commissioner that the president is under or over a certain age, and that the general secretary is of one nationality rather than another, or for any other purely arbitrary reason; nor, indeed, does the defendant, who is an intelligent and useful official, make so extreme a claim as that.

The Act mentions numerous grounds for revocation, some of them being specially stated as "unsound condition" (Secs. 5 and 12), failure to pay final judgment (Secs. 5 and 48), failure

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to pay prescribed tax on gross premiums (Sec. 19), etc.; and among others embodied in general phrases are, "has failed to comply with the law" (Sec. 5), or "shall violate or neglect to comply with any provision of law obligatory upon it" (Sec. 12).

It is by virtue of these two general phrases, and especially the latter of them, which seems to relate more particularly to companies of foreign countries, that the authority for the revocation proposed in the present instance is asserted by the Insurance Commissioner; and if that authority exists at all it must be found there, for it is not given elsewhere. What, then, do those phrases mean, and what matters are included in them? The complainant contends that the words, "the law," as there employed, mean the particular Act in which they occur, and that the other words, "any provision of law obligatory upon it," mean any requirement of this Act without more; and, consequently, that only a failure to meet some one or more of the many requirements of the Act itself affords a legal ground for revocation. If this construction be a correct one, the conclusion suggested follows necessarily; and, besides, it also follows from such a construction that the defendant's proposed action was without authority, for the dereliction set forth in his notice does not concern any duty expressed in any of those requirements.

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The defendant insists, however, that those words, "the law," and "any provision of law obligatory upon it," have a more comprehensive signification; that they embrace all law, and every provision of all law that is applicable to foreign insurance companies in this State, the present Act, and other statutes and the common law as well.

This view has in its favor the obvious fact that the Legislature intended, in the interest of policy holders in the State, to confer upon the Insurance Commissioner plenary power to revoke the license of any foreign insurance company that might violate, affirmatively or by noncompliance, any legal obligation affecting their rights. Protection of policy holders and revenue to the State are the controlling objects of the Act, the former being paramount; and one of the chief facilities and safeguards of those purposes, the principal one perhaps, is the power of revocation lodged with the Insurance Commissioner.

It would be unaccountably strange, if in fact true, that the lawmakers did not intend, at least to include among the reasons for which a license might be revoked, a nonobservance of the peremptory requirements of other pertinent statutes. Registration of charter and charter abstracts is the first requirement the law makes of every foreign insurance company desiring to do business in this State, and yet, a discovery by the Insurance Commissioner that a particular company has not

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observed that requirement, as it claimed to have done when its license was granted, cannot, under the construction urged by the complainant, be regarded as a ground for revocation, for that requirement is not found in this Act, but only in the Act of 1877 as amended by the Act of 1891. Manifestly that requirement is a part of "the law," a "provision of law obligatory upon" every foreign insurance company coming here to transact business; and a noncompliance therewith was undoubtedly intended to be embraced in this Act of 1895 as a ground for revocation. The same observation may be made in respect of the requirement of Chapter 107 of the Acts of 1893, to the effect that insurance companies shall pay their policy holders "the full amount of loss sustained" up to the maximum sum named in their policies, notwithstanding the presence therein of the accustomed three-fourths loss clause, which that Act was designed to prohibit and nullify.

The Court deems it but little less certain that the common law obligations of a foreign insurance company that go to the general integrity of its business and affect all policy holders in the same way, are likewise comprehended in the language, "the law" and "any provision of law obligatory upon it;" and, consequently, that breaches of those obligations, persisted in after notice, are among the contemplated grounds of revocation.

The objection that those obligations are so numer-

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ous, and some of them so hard to define, that the Insurance Commissioner could scarcely have been expected to understand and rightly apply all of them, is very plausible; but it has not the force that is necessary, under familiar rules of construction, to exclude from the plain words of the statute so important a part of that which they naturally include, and whose inclusion is so entirely in harmony and accord with other parts of the scheme for accomplishing the paramount object of the legislation, viz., protection of policy holders as a class.

It now remains to ascertain the exact ground on which the defendant based his proposed action, and then, as it is clearly not a violation of any statute provision, to inquire whether or not it may properly be characterized as a breach of some common law duty which the complainant owed all of the interested class of policy holders alike.

The Traders' Fire Insurance Company of New York had a large number of outstanding policies on property situated in Tennessee and elsewhere. Desiring to retire from business, that company, on April 27, 1900, entered into a written contract with the complainant, whereby the latter agreed, upon condition that the recited consideration should thereafter be paid, "to assume," from that day, all "fire risks" of the latter "not otherwise re-insured." On May 9, 1900, after the dates for

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the payment of two installments of the consideration for \$10,000 and \$25,000, respectively, had passed, the complainant wrote a letter to the former representative of the other company in this State, advising him that the "outstanding business of the Traders' has been reinsured" by the complainant, and making no reference to the fact that the contract between the two companies was conditional. That letter was promptly forwarded to the Insurance Commissioner, and the Traders' "policy holders in Tennessee were notified" of the fact of reinsurance by the complainant. August 3, 1900, the complainant declared its contract with the Traders' company "null and void," for nonpayment of consideration, and gave notice thereof to parties concerned.

This latter action of the complainant is the ground on which the proposed revocation is based.

In view of the fact that the contract, as originally communicated to the Insurance Commissioner and Tennessee policy holders in the manner stated, was one of unconditional reinsurance, he regarded the subsequent declaration of nullification and invalidity for noncompliance with an undisclosed condition, as an act of bad faith on the part of the complainant; and, hence, notified it that unless it reversed that course of conduct toward citizens of this State who hold the Traders' policies, he would be led to revoke its authority to continue business here.

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It is beyond question that after the contents of its letter of May 9, 1900, became known, the complainant owed the Tennessee patrons of the Traders' company, in the aggregate, the common law duty of good faith in reference to the contract of reinsurance; and, under the ruling already made herein, a violation of that duty would afford proper ground for revoking its license. Whether or not there had in fact been such a violation, however, was a matter to be determined, in the first place, by the Insurance Commissioner according to his official judgment and discretion, the Court having no power to consider it in this proceeding.

The notice of the Insurance Commissioner cannot properly be construed as a demand that the complainant confess ultimate liability on the policies referred to therein, or do any thing else that would cut it off from any legitimate defense it might have to any suit or suits that might be brought thereon.

On the contrary, the most that his language as a whole, and in view of what had previously transpired, can rightly be said to require is, that the complainant must, as to Tennessee policy holders, on pain of disbarment for failure, retract its action in declaring the reinsurance contract null and void, and by such retraction resume its former relation to them, whatever that relation may have been.

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It results that the second assignment of demurrer was well made, and should have been sustained, and the bill dismissed, as is now done.

Reversed.

Judges Beard and McAlister dissent from the holding that the violation of a common law obligation is included among the grounds of revocation.

Coal Creek, etc., Co. v. Tennessee Coal, etc., Co.

COAL CREEK, ETC., CO., v. TENNESSEE COAL,
ETC., CO.

(Nashville. March 26, 1901.)

1. CORPORATIONS. *Have corporate existence, when.*

The complainant corporation, having been chartered in 1872 by decree of a Chancery Court for a term of twenty years, and having had its charter limit extended five years by Ch. 197, Acts 1887, and the persons constituting the corporation having before its dissolution availed themselves of the privilege granted by Ch. 146, Acts 1893, has such corporate existence as entitles it to maintain this action for collection of a debt. (*Post*, p. 666.)

Acts construed: Acts 1887, Ch. 197; Acts 1893, Ch. 146.

Case cited: *Heck v. McEwen*, 12 Lea, 97.

2. SAME. *Power to lease property.*

A private corporation has inherently, and by statute, the power to lease to another corporation, as well as to individuals, all, or at least such part of its property as will not cripple its exercise of its franchise. The statute that authorizes corporations to "dispose of" their property confirms to them the power to lease same. (*Post*, pp. 667-672.)

Code construed: § 1472 (T. & S.).

Cases cited and distinguished: *Marble Co. v. Harvey*, 92 Tenn., 115; *Mallory v. Oil Works*, 86 Tenn., 604.

3. SAME. *Same.*

Private corporations are not embraced by Acts 1887, Ch. 196, which regulates the method and formalities by which corporations may make valid leases and dispositions of their property and franchises. That statute, though general in terms, is restricted by necessary construction to quasi public corporations. (*Post*, pp. 672-677.)

Act construed: Acts 1887, Ch. 196.

Cases cited: *Parker v. Bethel Hotel Co.*, 96 Tenn., 252; *Frazier v. Railroad*, 88 Tenn., 153.

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4. **SAME.** *Same.*

Acts 1887, Ch. 196, prescribing method and formalities for a valid leasing or disposition of property and franchises by corporations, does not, even as to quasi public corporations, require observance of its provisions as to ordinary leases and dispositions of corporate property that do not cripple or interfere with the proper discharge of corporate duties, but only to the lease and disposition of those corporate properties and franchises which are coextensive with corporate life and are essential to corporate integrity and to the proper discharge of those corporate duties and functions that are imposed by law. (*Post*, pp. 672-677.)

Act construed: Acts 1887, Ch. 198.

5. **SAME.** *Neglect or abuse of corporate privileges.*

Unlawful neglect or abuse of corporate privileges affords no defense to an action of the corporation to recover a debt. (*Post*, p. 672.)

Case cited: *Barron v. Turnpike Co.*, 9 Hum., 304.

6. **STATUTES.** *Construction of.*

When the intent of a statute is clear, general words will be restrained to that intent, and words of narrower import will be expanded to embrace and effectuate that intent. Words may be modified, altered or supplied so as to obviate repugnancy to or inconsistency with such intent. (*Post*, pp. 672-677.)

7. **LEASE.** *Stipulation for liquidated damages.*

A stipulation in a lease of a coal mine for the term of twenty-five years, subject to surrender at the option of the lessee at the end of any year, constitutes a valid contract for liquidated damages, and is enforceable as such, which provides that the lessee shall take out at least a specified number of bushels per annum, at a specified royalty per bushel, paying the rental quarterly, and that, in default of taking out the specified quantity, he should, nevertheless, at the end of the year, pay for that amount. (*Post*, pp. 677-684.)

Case cited: *Railroad v. Cabinet Co.*, 104 Tenn., 568.

8. **SAME.** *Collecting rental, no bar to claim for liquidated damages.*

Collection of rentals on the coal actually taken out by the lessee constitutes no bar to a subsequent action for his breach of contract in failing to take more, for which liquidated damages are stipulated. (*Post*, pp. 684-687.)

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9. SAME. *Not void by reason of inferior quality of coal.*

Under a finding of the Court of Chancery Appeals, that the coal was not unmerchantable, but merely of inferior quality, this Court cannot declare the minimum royalty provision in the lease of a coal mine void for want of consideration. (*Post*, pp. 687, 688.)

FROM DAVIDSON.

Appeal from Chancery Court of Davidson County.
H. H. COOK, Ch.

LUCKY, SANFORD & FOWLER and W. L. GRAN-
BERRY for Coal Creek Mining & Mfg. Co.

BAXTER & HUTCHESON and R. F. JACKSON for
Tennessee Coal, Iron & Railroad Co.

BEARD, J. The bill in this cause was filed to collect royalties alleged to be due to the complainant under a lease made on January 30, 1888, by the complainant to J. W. Renfro and others, assigned by the latter to the Cumberland Coal Mining Company, and by that company to the defendant, both assignments having been made with the consent of the complainant; also another lease, dated January 25, 1892, made by the complainant to the Cumberland Coal Mining Company, and by the latter, with the consent of the complainant, assigned to the defendant.

It is unnecessary to set out all the clauses in

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these leases, inasmuch as the present controversy is narrowed to the claim depending upon a proper construction of a leading clause in each. That in the lease first mentioned is clause six, and is in the following words:

“6. And the said parties of the second part hereby covenant and agree that they will pay to the party of the first part for all steam or run of mine coal, mined or agreed to be mined, a rent, or royalty, of one-half ($\frac{1}{2}$) cent per bushel of eighty (80) pounds; and will also pay a rent, or royalty, of one (1) cent per bushel of eighty (80) pounds for all lump or domestic coal mined, or agreed to be mined, and the said party of the second part also covenant and agree that they will mine and take from the said premises hereby (demised) not less than twenty-five thousand (25,000) tons, or six hundred and twenty-five thousand (625,000) bushels of coal during each of the years 1889 and 1890; and for every year thereafter during the continuation of this lease they agree to mine and take from said premises not less than fifty thousand (50,000) tons, or one million two hundred and fifty thousand (1,250,000) bushels of coal; and that if during each of the years 1889 and 1890 they shall not have mined and taken from said demised premises at least twenty-five thousand (25,000) tons, as herein provided, then they shall pay to the party of the first part, on the twenti-

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eth day of January next succeeding the expiration of each year, in cash, as liquidated rent for said premises during such year, such sum of money as added to the amount of rent, shall be equal to the sum of four thousand (\$4,000) dollars, and for the full term of this lease after the expiration of the year 1890, in case they shall not have mined and taken from the said premises at least fifty thousand (50,000) tons each year as herein provided, then they shall pay to the party of the first part, on the twentieth day of January next succeeding the expiration of each year, in cash, as liquidated rent or royalty for said premises during such year, such sum of money as added to the amount of rent or royalty, shall be equal to the sum of eight thousand (\$8,000) dollars; that they will keep all necessary and proper books showing the amount of coal mined, and will make to the party of the first part regular monthly and quarterly reports, in writing, showing the number of bushels of coal mined in each month and quarter, and showing separately the amount of said coal used for coke, if any. Such quarterly reports to be made on the first days of January, April, July, and October, and said monthly reports to be made on the first day of each month in each and every year during the continuance of this lease, said reports to be made in duplicate, one copy to be delivered or mailed to the secretary of the party

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of the first part, at his office, and the other to the treasurer of said party of the first part, at his office in Knoxville, or wheresoever said office may be; and said parties of the second part will within thirty (30) days after the time for making each of such quarterly reports, pay to the treasurer of the party of the first part, or to such other person or corporation as may hereafter be designated by the party of the first part, all the rents or royalties accrued for the coal so mined or agreed to be mined by the parties of the second part during such preceding quarter, which rents and royalties shall be considered due at the end of each quarter, and shall be paid within thirty (30) days thereafter."

While the controversy, so far as this lease is concerned, arises upon the clause six, it is proper to call attention to clauses fourteen and fifteen, which are incidental to it.

By the fourteenth clause of the lease it was provided that "the party of the second part (the lessees), on the happening of any occurrence that should render the mining of coal unprofitable, without fault or negligence on their part, at the expiration of any year of the term, shall have the right to surrender the lease by giving notice of such surrender to the party of the first part and paying to it all sums of money due up to the time of such surrender;" while by clause fifteen it was provided that "the successors and

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assignees of the party of the first part, and heirs . . . and assignees of the parties of the second part, shall be bound by and entitled to the benefit of . . . the covenants, conditions, and arrangements herein contained."

This lease was for the term of twenty-five years, unless otherwise legally terminated.

The second of these leases, to wit, that made to the Cumberland Coal Mining Company, is substantially the same as the one just quoted, with the following exceptions: It is made directly to the Cumberland Coal Mining Company instead of to Renfroe & Company; was to run twenty-one years from the first day of July, 1892; the subject of it was a tract of 1,700 acres, fully described in the lease; it contained a covenant and agreement that the party of the second part, the Cumberland Coal Mining Company, would mine and take from the premises not less than 15,000 tons, or 375,000 bushels of coal during the year 1892, and for every year thereafter during the continuance of the lease not less than 50,000 tons, or 1,250,000 bushels of coal, and that if during the year 1892 they should not have mined and taken from the premises at least fifteen thousand tons, then the party of the second part should pay to the party of the first part, on the twentieth day of January next succeeding the expiration of such year, in cash, as liquidated

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rent for said premises during said year, such sum of money as added to the amount of rent or royalty already paid for each year, should be equal to the sum of \$2,000; and that for the full term of the lease after the expiration of the year 1892, in case they should not have mined at least 1,250,000 bushels each year, as provided, then the party of the second part should pay to the party of the first part, on the twentieth day of January next succeeding the expiration of such year, in cash, as liquidated rent or royalty for said premises for such year, such sum of money as added to the amount of rent or royalty already paid for such year, as should be equal to the sum of \$8,000, etc.

Immediately upon receiving the assignments of these leases the defendant company took possession of the properties covered, and operated them until about July 1, 1894. However, on March 14, 1894, the Tennessee Coal, Iron & Railroad Company addressed a letter to the complainant, in which it was stated that because of "existing conditions of the mine it is impossible for us to conduct operations without losing money," and that the company had "decided to surrender the leases on the tenth of July next," under the authority of that clause in each of the leases providing for a surrender of the same at the close of any year under certain conditions which the letter

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stated then existed. On March 16 the complainant replied to this communication, and as this reply bears upon a question arising further along, it is given in full, as follows:

"GENTLEMEN—I have your favor of March 14th, and regret very much to hear of your decision to surrender the Big Mountain leases. You have, however, worked the mines long enough to be able to determine whether or not you can operate them successfully.

"I beg to call your attention, in this connection, that by the clause of the lease under which you surrender the mines it provides that before the final surrender is made that you should pay whatever is due up to that time, which, of course, means the minimum royalty as provided for in the lease.

"When parties leasing from this company have continued their effort to mine coal, we have never enforced the minimum royalty, as provided for in the lease. In case, however, a lessee availed himself of his privilege of surrendering the lease under the clause to which you allude, I think this company should collect the minimum amount as provided for by the lease, and which you doubtless would expect to do. You will readily see the amount you have been paying is not up to the minimum provided for by the lease, and I therefore would be glad to have you make up

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a statement of the amount so that I can see if it tallies with our books.

“Very truly yours,

“W. P. CHAMBERLAIN, *Treas.*”

On or about the first of July, 1894, the defendant abandoned the property, and the complainant entered. Questions of liability growing out of the occupancy by the defendant being unadjusted, the bill in the present cause was filed to enforce payment of a large balance of \$25,890.53, with interest, claimed by the complainant to be due from the defendant as liquidated rent or royalty under these leases during its period of occupancy. This claim is thus stated in a paragraph of the bill: “Complainant further shows to the Court that under the terms of the aforesaid leases, owing to the failure of defendant during the years 1892, 1893, and 1894 to mine a sufficient amount of coal to yield the minimum liquidated rent or royalty stipulated for in said leases, there became due and owing to complainant on January 20, 1894, the sum of \$12,438.05, which bears interest from that date, and on July 1, 1894, the date of the abandonment of the leases by defendant, the sum of \$6,033.64, which bears interest from that date, making the aggregate principal sum of \$25,890.53, with interest on the respective portions thereof from the dates above mentioned. This amount was due and unpaid on July 1, 1894, and owing from defendant to com-

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plainant at the time defendant abandoned the said leases as above stated."

There was an original answer, and several amended answers, filed to the bill, in which a number of defenses, some material and others now immaterial to the case, were set up. Those material are that defendant, with reference to all matters growing out of its occupation of the mines, under these leases, had made a full and final settlement with complainant, and had paid to it the amount of funds due on this settlement; that the defendant had expended \$60,000 or more in developing these mines, and had discovered that the coal therein was worthless and unmerchantable, and that being so their leases were not supported by any legal consideration, and that no action upon them would lie; that complainant is a corporation of the State of Tennessee, chartered on March 14, 1872, by decree of the Chancery Court of Roane County of this State, under Chapter 54 of the Acts of the Legislature of 1870; that it was incorporated as a manufacturing, quarrying, and mining corporation, with the power "to hold, purchase, dispose of, and convey real and personal estate to the extent prescribed by law, and if not limited by law, such an amount as the business of the corporation requires;" that the corporation exceeded its power in the lease to J. W. Renfroe and others, and that the lease was therefore *ultra vires* and void, as was the transfer of

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this lease to the Cumberland Coal Mining Company and its later assignment to the defendant; that this is equally so as to the lease made directly to the Cumberland Coal Mining Company and the assignment of the same to the defendant.

It was further averred by way of defense that though incorporated for the purpose of mining, manufacturing, and quarrying, yet complainant had never engaged in doing either of these things; "that it had utterly failed to discharge any of its corporate functions; that its duties and functions as a mining company had been relegated to and discharged by lessees of its coal lands; that it was a mining and manufacturing company only in name; that its only business in fact had been to lease its coal lands and collect its rents;" and for these reasons the leases in question were *ultra vires*.

The answer also relies on a noncompliance by the complainant in making these leases with Chapter 198 of the Acts of 1887, which is entitled "An Act to empower corporations to lease and dispose of their property and franchises." Section 1 of this Act provides as follows:

"That all corporations now or hereafter existing under the laws of this State, whether incorporated under special or general laws of the State, shall have the power, and they are hereby authorized and empowered, to lease and dispose of their property and franchises, or any part thereof, to

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any corporation of this or any other State engaged in or carrying on, or authorized by its charter to carry on in this or any other State, the same general business as is authorized by the charter of such lessor corporation, and said corporations shall likewise have the power, and are hereby authorized to make any contract for the use, enjoyment, and operation of their property and franchises, or any part thereof, with any such other corporation of this or any other State, on such terms and conditions as may be agreed upon between the contracting corporations; and such lessee corporation or corporations is authorized and empowered to make and carry out such leases and contract; provided, however, that any such leases or contract, when made by or under direction of the board of directors of the contracting corporation, shall be authorized or approved by the vote of a majority in amount of the stock of the lessor corporation present or represented at a regular or called meeting of the stockholders of such corporation; and provided further, that sixty days' notice of such meeting be given in a Memphis, Knoxville, and Nashville newspaper of the time, place, and purpose of said meeting; and provided further, that where the lessee corporation is a corporation of this State, the authority or approval of its stockholders shall in like manner be obtained to the contract or lease; and provided further, that this Act shall

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not be so construed as to authorize any corporation of this or any other State to lease or purchase any railroad line that is a competitor for the same business, with any line already owned, or under control, by lease or otherwise, or two lines of railway that are competitors for the same business in this State."

It is averred in the answer that the requirements of this proviso were in no particular complied with; that the original lease nor the several assignments thereof were at no time authorized or approved by the "vote of the majority in amount of the stock of the lessor corporation present or represented at a regular or called meeting of the stockholders of such corporation; that sixty days notice of such meeting was at no time published in the newspapers, and that in the case of Cumberland Coal Mining Company this corporation accepted its original lease and transferred this and the Renfroe lease to the defendant without the authority of its stockholders in like manner and without publication calling for a meeting of its stockholders, and that the defendant corporation also failed to obtain the approval and authority of its stockholders to the acceptance of said lease as required by the statute. It is therefore insisted that the making of the original leases was *ultra vires* as to complainant company, and the acceptance of the Cumberland Coal Mining Company of the lease made

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to it, and its transfer of this and the Renfroe lease, was *ultra vires*, and the acceptance by the defendant company as assignee of this lease was equally *ultra vires*, so that no legal obligations arise therefrom.

Much evidence was taken by both parties, and upon the hearing of the case the Chancellor decreed that there was a balance due from defendant to the complainant, under the royalty clauses already set out in the lease, aggregating (\$23,784.28) twenty-three thousand seven hundred and eighty-four dollars and twenty-eight cents, to which interest was added, making the total recovery \$34,280.03) thirty-four thousand two hundred and eighty dollars and three cents. From this decree an appeal was taken by the defendant. The Court of Chancery Appeals affirmed this holding, and the case is now before us on an appeal.

The assignments of error to the action of the Court of Chancery Appeals are as follows:

(1) That complainant's charter has expired, and it is therefore no longer a corporation.

(2) That complainant had no authority in law to execute the leases.

(3) That neither complainant or defendant complied with Chapter 198, Acts of 1887, nor did the Cumberland Coal Mining Company, therefore the defendant acquired no title under the assignments made to it.

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(4) That the liquidated or stipulated rent or royalty is in fact a forfeiture or penalty.

(5) That inasmuch as complainant treated the leases as null and void on July 1, 1894, when the defendant surrendered, or attempted to surrender them, it cannot now predicate an action thereon, even for the time the defendant was in actual possession of the leased premises.

(6) That the minimum royalty clause in the leases is not enforceable because of failure of consideration.

As to the first assignment of error, as little, if any, stress is laid upon it in argument, it is only necessary to say that the complainant was incorporated by decree of the Chancery Court of Roane County in March, 1872 (*Heck v. McEwen*, 12 Lea, 97), and that it had a life of twenty years; that Chapter 197 of the Acts of 1887 authorized the continuance of the existence of all corporations whose charter expired by limitation for the term of five years from the period of such limitation; and that subsequently, but before the dissolution of this corporation, the persons organized as such availed themselves of the privilege granted by Chapter 146 of the Acts of 1893, and conforming in every respect to its provisions, continued the existence of the corporation. There is nothing in the assignment of error, and it is overruled.

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2. The next objection urged is that complainant had no right to make the leases in question.

The power to lease, at least so far as private corporations are concerned, is an incident of ownership (Thompson on Corp., Sec. 8365, Vol. 7; Angell & Ames on Corp., Sec. 91; Beach on Corp., Vol. 2, Sec. 263; Morawetz on Corp., Vol. 2, Sec. 1121). But in addition § 1472 of the Code, 1858, gives to all private corporations the power "to hold and purchase, dispose of and carry, real and personal estate to the extent prescribed by law; and if not limited by law, such an amount as the business of the corporation requires." In this power to "dispose of" is included the power to make leases.

The argument of the defendant seems to concede, and if this is not true, it is at least well established, that the complainant, though incorporated to carry on a mining, quarrying, and manufacturing concern, has not done either of these things, and that it is the owner of a very large body of lands which might be utilized by it for either of these corporate purposes, but has not been. These matters cannot be the subjects of judicial determination in this cause. If the corporation has been guilty of neglect or abuse of its corporate privileges in respect to these matters, it is for the State alone to make the question. *Barron v. Turnpike Co.*, 9 Hum., 304; Thompson on Corp., Sec. 8358; *Cowel v. Colorado*

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Springs Co., 100 U. S., 55; *Natima Water & Mining Co.*, 14 Col., 544; *Russell v. Texas, etc., Ry.*, 68 Texas, 646.

This being the law, it can therefore make no difference with the defendant, even if it be true, as suggested in the brief of defendant's counsel, that by a failure to compel complainant to employ so much of its capital as may be necessary "in opening mines, constructing tracks, buildings, machinery, structures," etc., it may be enabled "to reach out and monopolize all the coal lands in the State." For the greater the abuse in this regard, the more imminent will be the necessity for, and the greater the probability of the State instituting proceedings for a forfeiture of its charter.

The exact point of the insistence in this regard of the able counsel is thus stated by him in his printed argument: "I do not contend that complainant has no power to execute a lease. On the contrary, I concede that it may execute any lease provided the purpose of executing the same be not to enable the company to carry on its business through the agency of another corporation. To illustrate: Complainant may lawfully make leases of its lands for agricultural purposes, inasmuch as the surface of the lands for agricultural purposes would not impair their use for mining purposes. Complainant may also make leases for the cutting of timber, provided such timber

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be not fit for manufacturing purposes. . . . Our only contention is that complainant cannot make any lease the purpose of which is to enable complainants to carry on its business through other corporations; and that contention is based upon the rule laid down in *Marble Company v. Harvey*, which prohibits a corporation from transacting its business through the agency of another corporation."

If this argument be sound, then carried to its legitimate result, if the complainant corporation was engaged by its employees in digging coal or quarrying marble, and there were large deposits of coal or of marble on its lands, which it could not hope to reach with its own capital and labor, intelligently and energetically bestowed, it could not lease a foot of its land to other corporations to develop these minerals, but would be put to the alternative of permitting the land containing this excess of deposits to lie idle and be a consequent burden on its resources, or else of selling it. Or if the complainant corporation had a manufacturing plant on a portion of its property which was being operated actively by it, and yet had other eligible but unused sites for such plants, it could not lease these to other parties. Or if it had bodies of timber on its lands, far in excess of its own requirement, it could not lease an acre of this timber, if the

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timber so leased was fit for manufacturing purposes.

It is true the statement of the proposition is limited to leases made to other corporations, but is it sound, when it leads to such results, however limited?

The contention is rested largely, though not altogether, as is seen in the paragraph from counsel's brief set out above, upon *Marble Company v. Harvey*, reported in 92 Tenn., 115. We do not think that case supports this contention. The gist of that case, and the Court's opinion in determining it, is found in the first of the syllabi, which is as follows: "A corporation cannot lawfully become the owner of shares in any other corporation unless by power specially granted by its charter or necessarily implied in it. The unauthorized purchase by a corporation of the shares of another corporation is *ultra vires* and void. No suit can be maintained by either party in furtherance or affirmance of such void contract, not even by a party who has fully executed the contract on his own part. Such illegal contract creates no estoppel upon either party."

That was a case where an Ohio corporation had purchased all the shares of stock of a Tennessee corporation engaged in a similar business and under a similar charter, and the controversy arose from the purchase of the last of the shares. The principle announced is limited to the facts

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of the case, which bear no analogy to those of the present.

The pith of the present contention is in the statement that "a corporation must carry on its business by its own agents, and not through the agency of another corporation." This statement forms a part of a paragraph taken from the text of Mr. Morawetz, Section 431, embraced approvingly in the marble company case opinion. The entire paragraph is as follows:

"A corporation has no implied right to purchase shares in another company for the purpose of controlling its management, nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its own proper business. A corporation must carry on its business by its own agents, and not through the agency of another corporation. It is clear also that a corporation has no implied right to speculate in shares unless this be the kind of business for which the company was formed."

It will be seen that the author is dealing with the purchase by one corporation of shares in another company, either for the purpose of controlling its management or as an investment, or with the view to speculate, and the sentence relied on here is to be limited to these matters. This is further apparent, when the cases are examined cited by the author in support of his text, to

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wit: *Mutual Savings Bank v. Meriden Agency Co.*, 24 Conn., 160; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me., 43; *Sumner v. Maury*, 3 Wood N. & M., 105; *Berry v. Yates*, 24 Barb., 199. These cases all involve and deny the power of one corporation to subscribe for or purchase shares of stock in another company, or to advance its capital to sustain the business of this other company.

It is also insisted that *Mallory v. Oil Works*, 86 Tenn., 604, supports this contention. We do not think so. In that case a number of oil companies formed a combination or syndicate and turned over their properties to an executive committee or management, upon terms which the Court held made a partnership unlawful in its character, and which either party could repudiate.

But after all, however stated, we agree with the Court of Chancery Appeals that "the contention goes back to the point that complainant is neglecting to use its franchises, as to running, manufacturing, and quarrying," and so neglecting could not make these leases. This is, however, a matter for the State, and not the defendant.

3. It is true that neither complainant nor the defendant complied with Chapter 198, Acts of 1887, and the question is, Does this failure make the contract of leasing void? Conceding for the moment that this Act applies to all corporations organized for profit, whether they be private or

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quasi public, is it true that every lease or sale made by such corporation to another similar corporation must conform to the requirements of this Act, under the penalty, if otherwise, of having the lease or sale avoided by the Courts? Is it true that if a railroad company finds that it has real estate or engines or cars or other property not needed for carrying on its operations, and which are needed by another railroad company, that no valid contract of lease or sale of these properties can be made, until the contract has been approved by a majority of the stockholders of the two corporations at meetings convened, after sixty days notice, in newspapers published in Memphis, Knoxville, and Nashville? Or is it true that a private corporation, such as a bank, owning real estate beyond its needs, cannot lease or sell such realty to another private corporation which does require it, without conforming to these same provisions? Could the Legislature have intended thus to hamper the ordinary transactions of such corporations? If the present argument is sound, this must be so, for the phrasing of the Act is that "they are hereby . . . empowered to lease and dispose of their property, franchises, or any part thereof to any corporation," etc., thus embracing the smallest and most insignificant of such transactions as well as the most important.

We do not think such a purpose was in the

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mind of the Legislature, and that a construction leading to such a result would be intolerable. On the contrary, we are satisfied that the intention of this Act was to regulate such, and only such, leases and sales of corporate property and franchises as were essential to corporate integrity and to the exercise of the duties and functions imposed by the terms of the company charter. A sale or lease involving those interests which are coextensive with corporate life it may well be said this Act regulates, but a sale or lease of property which does not to the slightest extent cripple or interfere with the proper discharge of the duties imposed by the charter of the company is not embraced within its intent.

If this be the right interpretation of the Act, even with the concession that a private corporation is embraced by it, then these leases cannot fall within it. For the record discloses that the complainant owns seventy-five thousand acres of mineral lands, of which these leases cover only twenty-eight hundred acres, while all the other leases given out by the company embrace only about sixteen thousand acres, leaving thus three-fourths of its holdings subject to its absolute control.

But we are satisfied that this legislation was never intended to embrace private corporations as contradistinguished from *quasi* public corporations. This is an enabling Act, and such a corporation

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did not require it; they have always had the power to sell all or any part of their property at their will. *Parker v. Bethel Hotel Co.*, 96 Tenn., 252; *Frazier v. Railroad*, 88 Tenn., 153; *Commonwealth v. Smith*, 10 Allen, 448; *De Camp v. Alward*, 52 Ind., 468; *Kansas City H. Co. v. Taner*, 65 Mo., 279.

At common law, the right of a corporation, acting by a majority of its stockholders, to sell its property was absolute, and was not limited as to objects, circumstances or quality. 2 Kent, 280; *Mayor v. Lawton*, 1 Vesey & B., 226; *Dinney's Case*, 2 Bland, 142; 4 Thompson Corp., §§ 5374, 5358.

And this common law right is as inherent in a quasi-public corporation, within well-defined limits, as in a mere private corporation. As was said by Mr. Justice Bradley, in *Branch v. Jessup*, 106 U. S., 468: "Outlying lands not needed for railroad uses may be sold. Machinery and other personal property may be sold." But when it comes to the disposition by mortgage, sale or lease of its franchises or of corporate property essential to its operation as a quasi-public corporation, then there is an exception to this right of alienation. This power of alienation by such a corporation, "by the great weight of authority, must be expressly conferred." *Frazier v. Railway Co.*, 88 Tenn., 138.

The reason for this exception to the general

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rule, as has been often announced by the courts, is that their franchises are granted in consideration that they will discharge those duties imposed by charter and in which the public is interested. So the law makes void every effort made by such corporation to deprive itself by alienation of its property necessary to the faithful discharge of these duties. It cannot relieve itself even by a vote of all of its stockholders of its duties by any mode of alienation. Every such effort is discountenanced by the Courts. *Frazier v. Railway Co.*, 88 Tenn., 138; *Thomas v. West Jersey Railroad Co.*, 101 U. S., 71; *Branch v. Jessup*, *supra*; *Central Trans. Co. v. Pullman Car Co.*, 139 U. S., 24.

Such a corporation, therefore, needed the aid of this statute. But it was "not so with corporations of a private character established solely for trading and manufacturing purposes. Neither the public nor the Legislature has any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on the business for which they are incorporated indefinitely and without any regard to the condition of their corporate property." *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393; *Ardisco Oil Co. v. Oil Co.*, 66 Pa. St., 375.

In view of these considerations, we think it

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clear, while the Act in question by its terms applies to "all corporations now or hereafter existing under the laws of the State," that under a well-settled rule of construction it will be limited to such corporations as required an enabling statute to do those things contemplated therein. This rule is thus stated by Mr. Sutherland: "When the subject-matter (of a statute) is once clearly ascertained, and its general intent, . . . general words may be restrained to it, and those of narrower import be expanded to embrace and effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate repugnancy or inconsistency with such intention." Sutherland on Statutory Construction, Sec. 218. This objection is therefore overruled.

4. It is earnestly insisted that the Court of Chancery Appeals was in error in holding the clauses in the lease contracts providing for a minimum rent or royalty were agreements to pay liquidated rent or royalty.

In making a contract parties are at liberty to leave open the question of damages for breaches thereof to the determination of the Courts, or else they may fix these damages in the contract itself. The confusion in the cases arises from the disposition of the Courts to relieve parties to contracts from what seem to be improvident bargains, by converting provisions which would naturally im-

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port an undertaking to pay a fixed amount for a breach into a penalty intended simply to coerce the obligor into the performance of his contractual duty. While this is true, yet it is generally affirmed by the Courts that "when the damages are in their nature indefinite and uncertain, and the parties have mentioned a specific sum of liquidated damages, it will be so regarded unless it be greatly disproportioned to any probable estimate of damages." 1 Beach on Contracts, Sec. 624; *Railroad v. Cabinet Co.*, 104 Tenn., 568.

It would seem that in a mining contract this latter rule would especially apply. The value of the lessor's coal imbedded in the earth as an income-producing property depends upon the amount of it which is excavated by the labor of the lessees. If much is thus produced the results for the lessor will be favorable; if little, then they will be correspondingly less. It is impossible for the lessor antecedently to determine how well the lessee will discharge his obligation, whether he will be slothful or diligent, and thus he is unable to calculate, either accurately or with approximation, what his money loss will be if the lessee is negligent in performing or wholly disregards his contract. Such a contract, it would appear, would be an eminently proper one for a stipulation providing liquidated rent or royalty for a breach. An examination of the authorities indicates that this

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is the view generally, if not uniformly, taken when this exact question has arisen.

In the new work of Barringer & Adams, of the Philadelphia bar, on the "Law of Mines and Mining," p. 108, it is said: "If the lessee sees fit to covenant to mine a certain amount, he will, as a general thing, be held to strict performance, or in case the ore is not taken out he will be held liable for the payment of rent and royalty the same as if it had been taken out—this being regarded as equivalent to stipulated damages, which may not be reduced by evidence of the actual value of the mineral, and this whether or not there is an expressed covenant to pay a royalty on a minimum amount."

In *Lehigh Zinc & Iron Company v. Bamford*, 150 U. S., 655, there was a mining lease providing for the payment by the lessee of a royalty of one dollar and fifty cents per ton on all concentrated ore mined from or used on the premises, with an additional provision that "in case the royalty due . . . to the parties of the first part according to the above rates shall in any year fall below the sum of \$1,000, then the party of the second part shall pay to the parties of the first part such additional sum of money as shall make the royalty of such year amount to the sum of \$1,000, which sum shall be held and taken as the royalty of that year." The suit was for a breach of this covenant for

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three years in succession, and a recovery was had for \$3,201.58. The Supreme Court, speaking through Mr. Justice Harlan, said: "Looking at all the provisions of the lease, it is clear that the defendant engaged to pay as rent, in each year, the royalties fixed in the lease; and if in any year the royalties fell below the sum of one thousand dollars, it was to make up the deficit so that the latter sum should, in any event, be paid annually as rent." The Court so holding affirmed the judgment.

In *Flynn v. Coal Co.*, 72 Iowa, 738, a lease of coal land provided that the lessee should pay a certain royalty on coal taken out, and also provided that a certain amount should be taken out, and it was held that the lessee was bound to pay royalty on the amount agreed to be taken out, whether actually taken out or not, and that, too, although a portion of the term was necessarily occupied in making preparations to begin mining.

In *Gilmore v. Ontario Iron Co.*, 86 N. Y., 455, the plaintiff leased certain land to the defendant for him to mine and move the iron ore therefrom. Among other things, the lessee agreed to pay twenty cents a ton for all ore and to mine eight thousand tons annually. It was held, in an action to recover for a breach of this agreement, that the lessee, upon his failure to exercise an option given him by the contract, was

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bound to pay at least sixteen hundred dollars annually.

In *McIntyre v. McIntyre Coal Co.*, 105 N. Y., 264, under dissimilar conditions, but such as required the consideration of a royalty clause in the lease of coal lands, it was recognized as a fixed and enforceable stipulation according to its terms.

The case of the *Consolidated Coal Co. v. Prees*, 150 Ill., 344, involved, among other questions, one as to a minimum royalty provision in a coal mining contract. As to this the Court said:

"We understand the rule to be that if, from the nature of the contract, damages cannot be calculated with any degree of certainty, or from the peculiar circumstances contemplated by the contract, the stipulated sum will be held to be liquidated damages. . . . We think that the rule last above stated is applicable to the case at bar. . . . Besides this, the clause in question was, under the circumstances of the case, an eminently reasonable one. Without it the effect of the contract would have been to divest appellee of all control over the coal under their land for the long period of twenty-five years, and would have left them without any power to compel the lessee or its assigns to take out a bushel of it. The lessee was a coal mining company and must be presumed to have been well informed in respect to the subject matter in regard to which it was contracting. It is manifest from the terms of the lease, as there

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set forth in the declaration, that the parties believed that the royalties would exceed, instead of fall below, \$1,200 per year. This is obvious from the fact that said sum is fixed as a minimum royalty to be paid."

In *Powell v. Burroughs*, 54 Pa. St., 329, with regard to the uncertainty attending a mining venture and the reasonableness of fixing a minimum royalty, the Court said: "The defendant covenanted to take out of the Burroughs mine leased in 1862, without any reference to any other mine or lease, so many tons per year while the term lasted; and on a failure to take them out to pay for the stipulated number taken or not taken. . . . It was therefore a clear case of stipulated damages in case of non-performance *pro tanto*. The parties fixed it as the true measure of damages in case of failure . . . and . . . were bound by it. The uncertainty as to the extent of the injury which may ensue is a criterion by which to determine whether it is a case of liquidated damages or penalty."

See also *Central Appalachian Co. Limited v. Buchanan*, 73 Fed. Rep., 1006; *Lehigh & Wilkesbarre Coal Co. v. Wright*, 177 Pa., 387; *Clark v. Midland Blast Furnace*, 21 Mo. App., 58.

The question of reasonableness or unreasonableness must be determined from the situation of the parties at the time the contract was made, and the nature of the business itself. On these points

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the Court of Chancery Appeals find the following facts: "The testimony shows that the mine in question had been worked for a considerable time by Renfro & Company and by the Cumberland Coal Mining Company. Also that before the lease was taken the defendant sent an expert to examine the mine. Both sides, therefore, knew the capabilities of the mine. The fact that a minimum amount was contracted for indicates that, in view of all of the circumstances then known to both parties, it was supposed that at least that much could be taken from the mine. Both parties were in possession of the facts known by which the reasonableness of the contract could be determined—that is, as to the nature and character of the mine and the quality of the coal and the probable output. Those circumstances were that the mine had been opened and worked as stated, and there appeared to be a sufficient quantity of coal and of a fairly salable quality. Under these circumstances it was not unreasonable that the parties should contract for a minimum amount to be mined, nor was the minimum fixed at a very large amount. The testimony shows several mines worked by the defendant where the output is greater than the minimum amount contracted for. There is one other element that should be considered in connection with the question of reasonableness, and that is the uncertainty that attended the matter from the complainant's standpoint as to

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how the defendant would in fact conduct its mining operations, and whether it would or would not exercise diligence in taking the coal from the mine. Another point to be considered in this connection is the fact that the complainant had put the defendant in possession of its mines for a long series of years, and had thereby placed the control of the mines out of its own power."

But it is insisted that there was a contemporaneous construction of these royalty clauses by the parties, showing that the sum stipulated was regarded as a penalty, rather than as liquidated damages. As to this the Court of Chancery Appeals finds the facts to be as follows:

"Taking up the matter at the time when the defendant became interested, the first installment of liquidated rent, or royalty, was due on the 20th of January, 1893, for the previous year, and on the 20th of January, 1894, for the year 1893. The proof shows that the lessees, at the end of each quarter, reported to the lessor the number of tons of coal actually mined during that quarter, and the lessor made out accounts against the lessees for the sums due to lessor for the coal so reported to have been mined during that quarter. The lessor itself, therefore, has made at least sixteen quarterly accounts for rent due under said leases, and in no one of said accounts did the lessor claim any rent, except the price per ton for coal actually mined; that is to say, in claim-

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ing payments for the amounts actually mined, nothing was at the time said about the coal not mined. The treasurer of the lessor never presented to defendant any demand for minimum royalty until after the defendant surrendered the leases in controversy in this suit. This demand appears in the letter which we have copied *supra*, and which letter was in reply to the notice of surrender which the defendants gave to the complainant."

In *Powell v. Burroughs, supra*, it appears the trial Judge declined to charge that a settlement for the rent of the past year, without exacting rent for coal not mined, according to the terms of the lease, was a discharge from liability on the covenant to mine a certain number of tons per annum, or, on failure to mine so much, to pay the rent as if mined. Upon an assignment of error to this refusal the Supreme Court said: "The learned Judge refused to respond as requested, and we agree he was entirely right in doing so. It was quite too much to affirm, as a conclusion of law, that payment for coal taken out was a discharge of all liability for a breach of the contract to take out a defined number of tons. The covenant to pay rent for the coal mined and taken away was distinct from the covenant to mine a certain number of tons. Receiving a stipulated sum for one was not necessarily a release of the other."

We think it equally too much to affirm as a

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presumption of fact in the present case that by a failure on the part of lessor to demand, either upon quarterly or annual settlements for the coal mined, a payment of that not mined up to the minimum, that thereby it waived its right to make such demand at its pleasure. Certainly in this form of settlement there was nothing to equitably estop complainant from making such future demand. In addition, the language of the clause in question is clear. There is no ambiguity in it. It admits, we think, of but one construction. Its effect was to confer a fixed legal right on the lessor and to impose a corresponding legal obligation upon the lessee. In the face of a clause so clear as this one in question, what is said in *Giles v. Camstock* (N. Y.), 53 Am. Dec., 374, is pertinent:

“The force of this contract of the lessee to pay in advance is sought to be avoided by the previous practice of the parties; which, as it appears by the testimony, was not in accordance with the terms of the lease; but the rent had before, in fact, been paid at the end of each quarter, and, of course, after it had accrued by occupation of the premises. But I apprehend the authorities relied upon do not reach the case before us. In *French v. Carhart*, 1 N. Y., 96, certain often recognized rules of construction were quoted and approved by His Honor, Judge Jewett, and among the rest, that when the words of grant are

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ambiguous, the Court will call in the aid of the acts done under it, as a clew to the intention of the parties. But the terms of this lease are not at all ambiguous; there is no doubt about their meaning, and it would be adopting an entire new rule to affirm that the specified time of payment of money is not, according to the intention of the parties, whenever the creditor shall not demand, or the debtor shall neglect to pay until some time after payment due. There is here no room for the operation of any rule of construction which arises out of doubtful or ambiguous terms of a written contract." This assignment is overruled.

5. The fifth objection is founded upon a misconception of a single phrase in complainant's bill, and is not warranted by the facts found in the case. There was no forfeiture on the part of the complainant, but a surrender of the lease by the defendant under a clause therein, which authorized it, and an acceptance of this surrender. Without elaborating this further, we are content to overrule this objection.

6. The sixth objection is that the coal in the property leased was unmerchantable, and that being so there was such a failure of consideration as to make the minimum royalty clauses unenforcable.

"While non-existence or exhaustion of coal may . . . relieve a lessee from the covenants of his lease, unmerchantability in the absence of special

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contract, mistake or fraud never does." This is stated to be the rule of law in Section 60 in the works of Barringer & Adams in their work already referred to. Certainly there is much force in the statement, and it is well supported by authority. But it is unnecessary for us to determine whether it is sound or unsound, as the Court of Chancery Appeals find as a fact that the coal in these lands, while inferior in quality, was not unmerchantable. This finding is conclusive on this point. The sixth assignment of error is overruled.

Other incidental questions have been discussed. The points pressed upon us have had that consideration which the importance of the controversy required, but after a careful consideration we find no error in the record, and the decree of the Court of Chancery Appeals is affirmed.

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McMILLAN v. HANNAH.

(Nashville. April 6, 1901.)

1. CONSTITUTIONAL LAW. *Declaration as to Cheatham County and its effect.*

The declaration of the Constitution of 1870, making Cheatham a constitutional county, makes all lands then actually included in its territorial limits part of the county, regardless of whether they were originally assigned to that county by a valid law. (*Post*, pp. 690, 691.)

Constitution construed: Art. X., Sec. 4.

2. SAME. *Statutes void that reduce area of old county below constitutional minimum.*

A statute is void as reducing the area of an "old county" below the constitutional minimum of five hundred square miles, which changes county lines so as to further reduce the area of a county recognized as constitutional by the Constitution of 1870, which never had, at any time, an area of as much as five hundred square miles. (*Post*, pp. 691-693.)

Constitution construed: Art. IV., Sec. 10.

Act construed: Acts 1881, Ch. 143.

Cases cited: *Marion County v. Grundy County*, 5 Sneed, 490; *Roane County v. Anderson County*, 89 Tenn., 259.

3. COUNTY. *Not estopped to assert claim to its territory, when.*

Acquiescence by a county, for a period of fourteen years, in the illegal claim of another county to a portion of its territory under an unconstitutional statute, will not estop such county to assert its right to the territory. (*Post*, pp. 693, 694.)

FROM CHEATHAM.

Appeal from Chancery Court of Cheatham County.

J. S. GRIBBLE, Ch.

McMillan v. Hannah.

A. E. GARNER for McMillan.

R. S. TURNER for Hannah.

CALDWELL, J. This record presents a bill of interpleader, whereby W. G. McMillan, a land owner and taxpayer, brought the counties of Cheatham and Dickson before the Court, for the purpose of ascertaining and settling by decree which of them had jurisdiction of his land and was entitled to receive his taxes.

The Chancellor decided the question in favor of the latter county, but the Court of Chancery Appeals reversed his action and pronounced a decree for the former one.

Cheatham was not one of the original counties of the State. It was created by and formed under Chapter 122 of the Acts of 1855-56, a portion of its territory being taken from the county of Dickson. The Court of Chancery Appeals has conclusively found as a fact that the land now owned by the complainant, and now here in question, is a part of that so transferred from the one county to the other, and that such was its location when the Constitution of 1870 was dopted.

That instrument expressly recognized Cheatham and other comparatively small and new counties as then formed, by the following provision, namely: "The counties of Lewis, Cheatham, and Sequatchie, as now established by legislative enactments, are

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hereby declared to be constitutional counties.”
Const., Art. 10, Sec. 4.

It follows, therefore, that this land is still within the proper territorial limits of Cheatham County, unless it has been legally transferred to some other county since the adoption of the Constitution.

Dickson County makes the contention that such a transfer has been made, and that she is the beneficiary thereof.

Undoubtedly Chapter 143 of the Acts of 1881 was enacted for the purpose of changing the line between the two counties so as to take this and other lands out of Cheatham and put them in Dickson County, and the terms employed are clearly sufficient for the accomplishment of that end if the legislation should be considered otherwise valid.

It is said in opposition to the validity of this Act that it undertakes to reduce the area of Cheatham County below the constitutional limit, and that for that reason it must be regarded as entirely nugatory.

The objection is a serious one. When originally established, and at the time of the passage of this Act, the area of Cheatham County was only 310 8-10 square miles, and the effect of the Act, if constitutional, was to diminish that area to the extent of the territory intended to be passed into Dickson County.

Section 4 of Article 10 of the Constitution au-

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thorizes the Legislature to form new counties from parts of old ones, each new county to have an area of at least 275 square miles, and no "old county" to be "reduced to less than five hundred square miles."

This restriction against the reduction of the area of an old county below the minimum named applies to the change of county lines as well as to the formation of new counties; and legislation in conflict therewith, whether for the one purpose or the other, is inevitably null and void. *Marion County v. Grundy County*, 5 Sneed, 490.

Every county having a legal existence when the present Constitution went into effect falls within the designation, "old county;" consequently, Cheatham, though not an original county, is an "old county," and as such entitled to the full benefit of the restriction mentioned.

It avails nothing to the advantage of Dickson County, or in favor of the constitutionality of the enactment, to say that Cheatham was not by the latter reduced below 500 square miles, but has always been so. The inhibition has the same force in such a case as in any other.

No reduction of an "old county" is allowable in any instance where it leaves a less area than 500 square miles. Only those having more can be diminished in any way. A larger county may be reduced to that limit, but a smaller one cannot be reduced at all.

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In the late case of *Roane County v. Anderson County* this Court held that the Legislature was without power to make any diminution of the area of a county that was already below that standard. 89 Tenn., 259. A like ruling was made by the Court of Chancery Appeals, and approved orally by this Court, in a still later litigation between the two counties now before the Court. *Cheatham County v. Dickson County*, 39 S. W. R., 734.

The conclusion follows, irresistibly, that the Act under consideration is unconstitutional, and that, being so, it is of no legal effect whatever.

Dickson County contends, however, in the next place, that Cheatham County is at least estopped by long acquiescence from now asserting any claim in conflict with the provisions of that Act. The facts pertinent to this contention are, that "Cheatham County made no attempt to assert jurisdiction over the land of the complainant, McMillan," for fourteen years after the passage of the Act, and that he, during that period, paid taxes, sat on juries, voted, served as election officer, and performed the functions of County Superintendent of Public Instruction in Dickson County.

These facts, though ample to preclude Cheatham County from a recovery of the taxes so paid, from either the complainant or Dickson County, are clearly not sufficient to work a transfer of the complainant's land from one county to another.

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The former matter was one of revenue merely, which Cheatham County had the power, if not the legal right, to waive and abandon, while the latter was one of territorial ownership, which she had neither the power nor the right to waive or abandon. She could well lose her rightful claim to complainant's taxes for a given period by knowingly permitting him to pay them to another claimant, but she could not by that or any other means contract the limits of her territory below the constitutional standard. The inhibition of the Constitution would be of but little force if it could be so easily nullified or evaded. A reduction of the area which the Legislature is inhibited from making by direct enactment, the county cannot accomplish by mere nonclaim for itself and simple acquiescence in the asserted claim of another. This is especially so where, as in this instance, the quiescent course is pursued for only fourteen years, and is then terminated by an affirmative assertion, in Court, of the original status.

The facts of this case do not call for the application of the doctrine announced in the cases of *Rhode Island v. Massachusetts*, 4 How., 591; *Indiana v. Kentucky*, 136 U. S., 479; and *Virginia v. Tennessee*, 148 U. S., 523.

Let the decree of the Court of Chancery Appeals be affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

JACKSON, APRIL TERM, 1901.

McLENDON v. WOODMEN OF THE WORLD.

(Jackson. April 13, 1901.)

1. BENEFIT SOCIETIES. *Certificate of, void when.*

A benefit certificate which is signed and delivered after the death of the applicant, is void, no matter how long the application for it had been pending or what other steps had been taken to mature and perfect it, where the liability of the society is conditioned, by the terms of the contract, upon delivery of the certificate to the applicant while living and in health. (*Post*, pp. 697-709.)

2. SAME. *Application and constitution and by-laws are part of contract, when.*

The application for a benefit certificate and the constitution and by-laws of the benefit society constitute the basis and part of

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its contract as fully as if copied into same, where they are referred to and declared such on the face of the certificate issued. (*Post*, pp. 707, 708.)

Cases cited: *Catholic Knights v. Kuhn*, 91 Tenn., 214; *K. of P. v. LaMalta*, 95 Tenn., 160.

3. **SAME.** *Waiver of condition.*

The condition that the liability of a benefit society shall not attach under its benefit certificate unless same is delivered to the applicant while living and in good health is a valid one that cannot be waived by the unauthorized, premature, and forbidden action of an inferior jurisdiction in initiating the applicant before his application has been accepted by the proper authority and the certificate delivered in compliance with the constitution and by-laws of the order. (*Post*, pp. 708, 710, 711.)

4. **SAME.** *Delay in acceptance of application.*

Mere delay of a benefit society in passing upon an application for a benefit certificate gives no rights to the applicant and does not afford any presumption of acceptance of his application. (*Post*, pp. 708-710.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

W. A. DUNCAN and C. D. M. GREER for McLendon.

R. M. BEATTIE and BROME & BURNETT for Woodmen of the World.

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WILKES, J. The defendant is a fraternal and beneficial order. Its objects and purposes are thus set out in its "Constitution and Laws":

"Sec. 3. The object of this order shall be to combine white male persons of sound bodily health, exemplary habits, and good moral character, between the ages of eighteen and fifty-two, into a secret, fraternal, beneficiary, and benevolent order; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; educate its members in moral, social, and intellectual matters, and promote fraternal love and unity; create a fund from which, upon reasonable and satisfactory proofs of the death of the beneficiary member who has complied with the lawful requirements of the order, there shall be paid a sum not to exceed three thousand (\$3,000) dollars to the person or persons named in his certificate as beneficiary or beneficiaries, which beneficiary or beneficiaries shall be his wife, children, adopted children, parents, brothers, sisters, or other relatives, and to erect a tombstone or monument at the grave of every such deceased member."

It is insisted that J. J. McLendon, the husband of the plaintiff, Mrs. A. T. McLendon, was a fraternal and beneficial member of the order at the time of his death on the third day of January, 1899, and that the plaintiff became thereby

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entitled to the payment of \$1,000 as his beneficiary.

By way of defense it is said on behalf of the order that J. J. McLendon, at the time of his death, was not a beneficial member of the order; that no certificate had been delivered to him, and that at the time of his death his application for membership and insurance was pending, but the contract had not been consummated and closed.

There were two trials in the Court below. Upon the first trial there was a verdict of a jury and judgment for \$1,180.17, which was by the Court set aside, presumably on the ground that there was no liability on the part of the company. A bill of exceptions was taken and preserved. Upon the second trial, the plaintiff having introduced her evidence and rested her case, the defendant association demurred to the evidence. Upon that demurrer issue was joined, and upon the hearing the trial Judge gave judgment for the defendant company, and plaintiff has appealed and assigned errors.

The evidence in the case is largely embodied in an agreed statement of facts. From this statement it appears that the deceased, McLendon, husband of plaintiff, made his application to become a member of the order November 28, 1898.

This application was forwarded by the local camp at Memphis to J. B. Frost, an officer of the order at Atlanta, Georgia, who, after counter-

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singing it, sent it to the Sovereign Camp of the order, at Omaha, Nebraska. By it the application and physician's report were delivered to the Sovereign Camp Physician on December 19, 1898, who returned it to the local camp physician to fill in certain answers in the applicant's "personal history." After filling in the required matter, it was returned to the Sovereign Physician December 29, 1898. It was then accepted by the order, and it issued the certificate December 31, 1898, and immediately sent it to the clerk of the local camp at Memphis.

Prior to the thirty-first of December, when the certificate was dated and issued, the applicant was taken sick, and from this sickness died January 3, 1899. The application, medical report, and certificate are all made part of the record by the agreed statement of facts.

The only payment made by the deceased was \$1 physician's fee and \$2 entrance fee. The printed constitution, by-laws, and rules of the order are also made part of the record.

It is agreed that the Sovereign Physician would state, if examined, that the application and medical examination was returned to the local camp physician in good faith for the purposes heretofore stated, and not for purposes of delay, but the truth of this statement is not conceded. By a supplemental agreement it appears that after the certificate was signed, dated, and issued, it was

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sent by the Sovereign Camp at Omaha to J. B. Frost, Provisional Head Consul at Atlanta, Georgia, who received it on or about January 4, 1899, and not knowing of the death of the applicant on the preceding day, January 3, 1899, he countersigned the certificate and sent it forward to the local camp; that the certificate was never signed by the Consul Commander and clerk of the local camp, and was not delivered to J. J. McLendon, or any one for him, on account of his illness and death, and that this illness antedated December 31, 1898, the date of the issuance of the certificate; that McLendon's death occurred January 3, 1899, prior to the receipt of the certificate by the clerk of the local camp from Frost, the Provisional Head Consul at Atlanta.

It was further agreed that all payments required of J. J. McLendon at the time his application was received and acted upon were made, and that all money received from him was tendered back to his widow after his death. Proof was introduced to show that some persons were initiated and obligated into the local Memphis camp as members before they received their benefit certificates, but it was not the custom of the local camp to do so.

The application, of date November 28, is for membership in the order and participation in the beneficiary fund to the extent of \$1,000 at the death of the insured, or such amount as the

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Sovereign Physician may approve, and a monument. It states that the entrance fee and certificate fee, amounting to \$10, accompanies the application, and it directs that a beneficiary certificate be issued, payable at his death to his wife, Anna T. McLendon. It also contains this statement, among others:

"I do hereby consent and agree that this application shall form the sole basis of my admission to and membership in this order, and the beneficiary certificate to be issued on this application," etc. It further provides that the application and examining physician's report are the basis of and shall form part of the certificate issued thereon. It is further agreed that all of the provisions and laws of the order now existing, or hereafter adopted, shall form a part of the certificate issued hereon, whether printed on or referred to in such certificate or not.

"I further agree that the liability for the payment of benefits to me, or my beneficiary, shall not begin until after this application shall have been accepted by the Sovereign Physician, a beneficiary certificate issued thereon and personally delivered to me, and I shall have made all the payments required in Section 56 of the constitution and laws of the order, and I shall have been obligated in due form."

Upon the back of the certificate is indorsed, "I certify that the applicant herein named was elected

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to membership the twelfth day of December, 1898." This is signed by the local clerk. Also indorsed is the certificate of the local physician as to the careful, personal examination of the applicant, a certificate of his identity, and that his fee for examination has been paid, etc.

Also a note that the application should be forwarded, if in a Southern State, to Jno. B. Frost, Provisional Head Consul, Atlanta, Georgia.

The following provisions of the constitution and by-laws are made part of record as bearing upon and fixing the right of the applicant, to wit:

"Sec. 56. The liability of the Sovereign Camp, or Beneficiary Head Camp, for the payment of the benefits upon the death of a member, shall not begin until after his application shall have been accepted by the Sovereign Physician or Head Physician, his certificate issued, and he shall have—

"1. Paid all the entrance fees.

"2. Paid his advance assessment.

"3. Paid the Sovereign Camp, Beneficiary Head Camp, or Camp General Fund dues for the month.

"4. Paid the physician's fee for medical examination.

"5. Having been obligated or introduced by a camp or authorized deputy in due form.

"6. Had delivered to him his beneficiary certificate while in good health."

"The foregoing is hereby made a part of the

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consideration for, and are conditions precedent to the payment of benefits in case of death.

"Sec. 57. The noncompliance with or nonperformance of any of the requirements in the preceding section, upon the part of the applicant, shall be an absolute bar to any claim upon the beneficiary funds of the order, under or by virtue of any beneficiary certificate that may have been issued in his name or by reason of any preliminary steps he may have taken to entitle him to the same; and no deputy, officer, or any member of the Sovereign Camp or Beneficiary Head Camp or Camps, has authority to change, alter, modify, or waive the foregoing requirements or the consequences thereof in any manner."

"Sec. 53. Upon the delivery of a beneficiary certificate to an applicant he shall deposit with the clerk of the camp one advance beneficiary assessment and one monthly payment of Sovereign Camp or Head Camp General Fund dues and camp dues. And no clerk shall accept payment of any advance beneficiary assessment or General Fund dues from an applicant until said applicant's beneficiary certificate has been received by said clerk from the Sovereign Clerk or Head Clerk, and properly countersigned by the camp officers, and not then unless said applicant is in good health at the time."

"Sec. 58. The following conditions shall be made

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a part of every beneficiary certificate, and shall be binding upon member and order:

“1. This certificate is issued in consideration of representations and agreements made by the person named herein, in his application to become a member, and in consideration of the payment made when introduced in prescribed form; also his agreements to pay all assessments and dues that may be levied during the time he shall remain a member of the Woodmen of the World.

“2. In case of his death while a member in good standing in the order, his beneficiary, or beneficiaries, shall receive the full amount named in his certificate, unless the proceeds of one assessment upon all members in good standing during the month following the approval of the claim shall be less than said amount, in which case his beneficiary, or beneficiaries, shall only receive the proceeds of one assessment in full settlement of all demands.

“3. If the admission fees, dues, or beneficiary fund assessments levied against the person named in this certificate shall not be paid to the clerk of his camp, as required by the constitution and laws of the order, this certificate shall be null and void, and continue so until payment is made in accordance therewith.

“4. The liability of the Sovereign Camp or Beneficiary Head Camp for the payment of benefits under this certificate shall not begin until the

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member named herein shall have paid all the entrance fees, paid his advance assessment, paid the Sovereign Camp, Beneficiary Head Camp, or Camp General Fund dues for the month, paid the physician's fee for medical examination, been obligated or introduced by a camp or authorized deputy in due form, and had delivered to him his beneficiary certificate while in good health. The foregoing provisions are hereby made a part of the consideration for and are conditions precedent to the payment of benefits in case of his death."

"Sec. 47. An application for membership shall be referred to a committee of three members, upon whose report a ballot shall be spread, three negative votes rejecting. If favorable, he shall be examined by the camp physician, paying a fee therefor. Should the examination be favorable, the physician shall forward the application to the Sovereign Clerk, Head Clerk, or Provisional Head Consul, as the case may be. If it shall be approved by the Sovereign or Head Physician, a certificate shall be issued in such a manner as he may determine, duly attested by the proper officers, and forwarded to the Provisional Head Consul, if under such a jurisdiction, if not, to the clerk of the camp; he shall notify the applicant, after which he can be introduced at a regular or special meeting.

"And it shall not be lawful for any camp,

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nor member thereof, to introduce nor obligate any applicant until his certificate shall have been received by the clerk of the camp, and unless said applicant shall be in good health at the time; *Provided*, That the condition herein requiring the applicant's certificate to have been received by the clerk of the camp at the time of his introduction or obligation, shall not apply when an applicant is introduced or obligated at the institution of the camp, nor when otherwise provided for by dispensation of the Sovereign Commander. But nothing herein shall be construed to authorize any member or camp to introduce or obligate an applicant while not in good health.

"Sec. 82. When an applicant applies for membership he shall pay the organizing deputy, or the camp clerk, the entrance or charter fees, which shall include that for the beneficiary certificate. But in no case must they pay to either the physician's fee.

"Sec. 83. Should an applicant be rejected by the Sovereign Physician or Head Physician, after he shall have been introduced, he may remain a fraternal member, and be entitled to all the rights and privileges of the order, except beneficiary, and as otherwise restricted in this constitution and laws; but the entrance or charter fee shall not be refunded to him.

"The camp shall collect and forward to the Sovereign Clerk or Head Clerk, from every such

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fraternal member, the same Sovereign Camp or Beneficiary Head Camp monthly dues as are paid by beneficiary members, the nonpayment of which shall cause his suspension. To reinstate, said delinquent fraternal member shall pay to the clerk of the camp all delinquent Sovereign Camp, Beneficiary Head Camp, and camp dues.

"He shall be required to pay the same camp dues as beneficiary members."

We are of opinion that under the provisions of the application and certificate, as well as the constitution and by-laws of the order, plaintiff cannot recover under the facts in this record.

The application signed by Mr. McLendon provides on its face that it, as well as the constitution and by-laws of the order, shall form the basis of the contract, and they enter into it and become a part of it as fully as if copied into it in so many words. Niblack on Benefit Societies, Sec. 18, pp. 34, 35; Sec. 136, pp. 271, 272; *Catholic Knights v. Kuhn*, 7 Pickle, 214; *Sup. Lodge Knights of P. v. La Malta*, 11 Pick., 160; 3 Am. & Eng. Enc. L. (2d Ed.), 1081; Bliss on Life Ins., Sec. 463; May on Ins. (3d Ed.), Sec. 552.

Under the terms of the application, certificate, constitution and by-laws, the beneficiary certificate was not in force until, among other things, the certificate was delivered to the applicant. Joyce on Insurance, Sec. 70; *McMaster v. N. Y. Life*

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Ins. Co., 99 Fed., 857; *Ray v. Security Trust & Life Co.*, 35 S. E. Rep., 246; *McDonald v. Provident Sav. Co.*, 84 N. W., 154; *Reese v. Fidelity Mutual Life*, 36 S. E., 637; *Pittsville Mut. F. v. Minnegua, etc.*, 10 Pa. St., 137; *Porte v. Am. Union*, 52 N. Y. Sup., 910; *McLane v. Mutl. Reserve*, 26 Atl., 38; *Conn. Mutl. Life v. Rudolph*, 45 Tex., 454; *Sup. Lodge v. Grace*, 60 Texas, 569; Bacon Ben. Societies, Sec. 272; *Wilcox v. Sovereign Camp*, 76 Mo. App, 573; *Watkins v. Sup. Lodge*, 18 S. W.; *Kuhn v. Mut. Reserve Co.*, 28 Fed., 707; 3 Am. & Eng. Enc. of L. (2d ed.), 1079.

And if the certificate, application, or constitution and rules so provide, he must at the time be in good health. Bacon on Benefit Societies, Secs. 232, 277; *Swartz v. Germania Life*, 18 Minn., 448; *Mulroy v. The Shownut Mut.*, 4 Allen, 116, 123. And if the applicant dies before delivery, the certificate does not become binding by delivery to the beneficiary. Niblack on Benefit Soc., Sec. 139, p. 280. And it could not become binding by an unauthorized delivery. *Fitzmorris v. Mut. Life*, 84 Texas, 61; *Kempe v. W. O. W.*, 44 S. W., 688. And the unauthorized action of the local camp would not bind the order. *Kempe v. W. O. W.*, 44 S. W. Rep., 688.

It is said there was unreasonable delay in returning the certificate, and it having been actually signed and issued from the Sovereign Camp

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December 31, should be held to take effect at a prior date.

It is only necessary to state that there does not appear to have been any delay arising out of bad faith on the part of the company.

Neither the application nor the constitution and rules of the order prescribe any limit within which the certificate shall be returned and contract completed.

Before the certificate was signed the applicant had become sick. Before it was ready for delivery he was dead.

There does not appear to have been any unnecessary or unreasonable delay, but only such as was required to perfect the application and examination.

Beneficial societies may decide for themselves whom and when they will admit as members. Until an applicant is accepted under the constitution, by-laws, rules and stipulations of the contract, he does not become a beneficial member, nor entitled to insurance.

Mere delay in passing upon his application will give him no rights and afford no presumption of its acceptance. Niblack on Ben. Soc., Sec. 142, pp. 282, 283; *Wilcox v. Woodmen of World*, 76 Mo. App., 573.

In the latter case, involving this same order, the applicant was not only duly and legally initiated, being a charter member (for whom special pro-

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vision is made), but the certificate was in the hands of the clerk of the local camp from July 2 or 3 to July 26, undelivered, and only lacking the signatures of the clerk and consul of the local camp, payment of the advance assessment and dues, and delivery of the certificate. The local camp met July 26 and designated the following day for such signing, payment, and delivery; on that day the applicant appeared and requested delivery of the certificate, saying he had the money for his payments. The clerk stated that the Consul Commander was not in, but would be soon, and would sign the certificate, and applicant could call later and get it. He replied "All right," and left, but never returned. The certificate was signed that day, the 27th, but was not delivered, because the applicant did not call for it. The applicant was drowned August 2, not having received the certificate. The Court held that delivery was essential, and in its absence, though to some extent the fault of the local officers, there was no liability on the company.

We think that the two cases cited by plaintiff's counsel of *Cooper v. Pac. Mut. Ins. Co.*, 8 Am. Rep., 705, and the other of *Cotton States Life Ins. Co. v. Lester*, 35 Am. Rep., 122, are not in point nor controlling in this case.

It is said that Mr. McLendon was initiated as a member by the local lodge, and this was a waiver. But this was clearly unauthorized under

McLendon v. Woodmen of the World.

the constitution and by-laws, and could have no other or further effect, if any, than to make him a fraternal and not a beneficial member. 3 Am. & Eng. Enc. Law (2d Ed.), 1080.

We see no ground of recovery for the plaintiff, and affirm the judgment of the Court below.

Bateman v. Ryder.

BATEMAN v. RYDER.

(*Jackson*. April 13, 1901.)

1. **MEASURE OF DAMAGES.** *For conversion of personal property of special value to owner.*

For conversion of personal property, *e. g.*, pictures and unpublished manuscripts, which, by reason of association, or for other reason, is of peculiar value to the owner, such as it has to no other person, and is not susceptible of supply or reproduction in kind, the measure of damages is not the ordinary one of market value at time and place of conversion, but the actual value to him who owns it at that date. The valuation should be made, in such case, with reasonable consideration of and sympathy with the feelings of the owner. (*Post*, pp. 713-715.)

2. **CHARGE OF COURT.** *Correct as to expert evidence.*

It is not error for the Court to instruct the jury, in a case where the facts justify a charge upon the question, that "the testimony of experts introduced for the purpose of establishing insanity or mental unsoundness, if paid for, should be received with great caution and carefully weighed by the jury," adding that "it was lawful and proper for an expert physician to charge a reasonable compensation or fee for his professional opinion or services." (*Post*, pp. 715-717.)

Cases cited: *Persons v. State*, 90 Tenn., 291; *Wilcox v. State*, 94 Tenn., 112.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. J. S. GALLOWAY, J.

Bateman v. Ryder.

EDGINGTON & EDGINGTON for Bateman.

G. T. FITZHUGH for Ryder.

WILKES, J. This is an action of trover brought by a mother against her daughter and her husband for the conversion of a guitar, four pictures, and a trunk containing clothing and manuscripts of prose and poetry composed by the plaintiff's former husband.

The action was commenced before a Justice of the Peace, and the damages were laid at \$500. There was a trial before the Court and a jury on appeal from the Justice, when there was a verdict and judgment for \$200, and defendants have appealed to this Court.

The first three assignments go to the measure of damages.

Testimony was admitted to show a special value to plaintiff of the articles, because they were gifts from her former husband, and because of the associations connected with them. It is said this was erroneous.

It is said the Court charged the jury that in fixing the value of the property they should consider the plaintiff's relations to the same.

What the Court did charge on this point was "that the jury must determine, from all the evidence on that point, what would be a fair and reasonable value for the property, considering plain-

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tiff's relation to the same and the rights of property."

The Court, upon request, refused to charge that the action, being in trover for the conversion of property, the measure of damages was the actual value of the property.

These assignments may all be treated together.

In actions of trover for the conversion of personal property, as a general rule, the measure of damages is the market or actual value of the property at the date of the conversion. 26 Am. & Eng. Enc. of Law, 818, and authorities there cited. But damages beyond the actual value of the property converted have been allowed the plaintiff when he has been subjected to some special loss or injury. 26 Am. & Eng. Enc. of Law, 849.

"One criterion of damages is the actual value to him who owns it, and this is the rule when the property is chiefly or exclusively valuable to him—such articles, for instance, as family pictures, plate and heirlooms. These should be valued with reasonable consideration of and sympathy with the feelings of the owner." 3 Sutherland on Damages, page 476; *Suydom v. Jenkins*, 3 Sandf., 620; *Spicer v. Waters*, 56 Barb., 227.

In Hale on Damages, page 182, Sec. 76, it is said: "When property has a peculiar value to the owner, such as it has to no other person, or when it cannot be exactly replaced by other goods

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of like kind, the actual value to the owner, and not the market value, is the measure of compensation."

The testimony shows that the four pictures were oil paintings bought in Italy by the plaintiff's husband at a cost of \$500, and presented to her while traveling, and were valuable intrinsically as well as from association; that the original cost of the guitar was \$50, and it was highly prized for its associations; that there was some considerable clothing in the trunk, besides a lot of manuscript productions in prose and verse of plaintiff's husband, which had never been published, and probably could not be reproduced. There is evidence, on the other hand, that the pictures were not well preserved; that their frames were dilapidated; that they would probably bring about \$20 at auction, and that the guitar would perhaps sell for \$5; that the clothing was worn and old, and of no real value, and that the manuscripts were of no value whatever.

We think the Court gave the proper instructions as to the measure of damages, and while we would have been better satisfied with a smaller judgment, there is ample evidence to support the amount given.

It is said that the trial Judge erred in charging the jury that "the testimony of experts introduced for the purpose of establishing insanity or mental unsoundness, if paid for, should be

Bateman v. Ryder.

received with great caution and carefully weighed by the jury."

The Court charged further upon this feature of the case, that "it was lawful and proper for an expert physician to charge a reasonable compensation or fee for his professional opinion or services."

We think that the rule laid down by the trial Judge is in substantial conformity to that announced in *Persons v. The State*, 90 Tenn., 291; *Wilcox v. The State*, 94 Tenn., 112.

It is said there is no evidence to support the verdict.

The facts of the case disclose an unpleasant litigation and controversy between a mother and her daughter and her husband.

It appears that the mother and daughter were in Los Angeles, California, in 1891. The daughter was then an unmarried woman and boarded with her mother. The mother had also another daughter with her by a second marriage. The two latter came to Memphis in 1891 and left the pictures, guitar, and trunk of clothing and papers with the defendant, paying her board for several months. At the expiration of that time, the board funds being exhausted, the defendant went to San Francisco and engaged in typewriting for a living. She subsequently married the defendant, Bateman, in Honolulu, in 1896.

She states that she sent the trunk to plaintiff

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to New York. She kept the pictures, as she says, because they had belonged to her father, and she understood had been given to her by her mother. The guitar she claims was given to her by her mother about fifteen years since, to practice on.

On the other hand, the mother says that the articles were left with the defendant for convenience and safe keeping, and that the daughter from time to time recognized her ownership in them, and promised to keep them for her.

The character of the plaintiff is attacked for credibility, and testimony is given by an expert physician that she is a lunatic of the type known to physicians as a paranoiac.

It is explained that the effect of this special type of the malady is a mania for litigation and an ungovernable desire and anxiety to be successful.

It would appear that this species of lunacy or mania is more common among attorneys than litigants. In this case, however, it is alleged to have attacked the client and affected her more than her lawyer.

The Court charged the jury, in substance, that they should receive the testimony of experts with caution; that if they found that any witness had been unsuccessfully impeached, or if they were satisfied that any witness was insane or mentally unbalanced, they could disregard such testimony if they saw fit.

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We think the case was fairly left to the jury, and that there is no reversible error in the record, and the judgment of the Court below is affirmed with costs.

Wright v. Redd Bros.

WRIGHT v. REDD BROS.

106	719
110	117

(Jackson. April 16, 1901.)

1. BILL OF EXCEPTIONS. *Must be filed within period of extension.*

Where an extension of time is granted beyond the term of Court for the preparation and filing of bill of exceptions, it must be not only signed by the Judge, but filed with the Clerk, before expiration of the period of extension; otherwise it cannot be looked to by this Court.

Act construed: Acts 1899, Ch. 275.

Cases cited: *Bettis v. State*, 103 Tenn., 339; *Muse v. State*, *ante* p. 181; *Jones v. Moore*, *ante* p. 188.

2. SAME. *Presumption in absence of.*

In the absence of a bill of exceptions the presumption is indisputable, in this Court, that the conclusion reached by the jury is that which the evidence required.

Cases cited: *Scruggs v. Heiskell*, 95 Tenn., 455; *Pratt v. Gillespie*, 97 Tenn., 217; *Daniel v. Coal Co.*, 105 Tenn., 471.

FROM DYER.

Appeal in error from Circuit Court of Dyer County. THOS. J. FLIPPIN, J.

BELL & GORDON and S. H. WILLIAMS for Wright.

LATTA & LATTA and DRAVER & RICE for Redd Bros.

Wright v. Redd Bros.

CALDWELL, J. This is an appeal in error by J. F. Wright, the unsuccessful defendant, in an action of replevin for the possession of two mules.

The substance of the only assignment of error is that there is no evidence to support the verdict, in that undisputed testimony shows that the mules involved were under mortgage to a third person, and, consequently, not subject to the possessory action of the plaintiffs, Redd Bros.

This objection calls for an investigation of the proof in the case, which, for the lack of a proper bill of exceptions, is not before us. The transcript contains what was intended as a bill of exceptions, with a detailed statement of the evidence introduced before the jury, but it cannot be regarded as a part of the record, and for that reason cannot be considered in this Court.

The appeal was granted at the end of the term, on December 22, 1900, and the defendant was, by order of the trial Judge, allowed fifteen days from that day for the preparation of his bill of exceptions. The bill of exceptions was signed by the Judge January 6, 1901, the last day of the extension, but was not "filed" by the Clerk until January 9, three days later. This was too late. Section 1 of Chapter 275 of the Acts of 1899, which is the only authority for extending time for the preparation of a bill of exceptions beyond the close of the term at which the case is tried, requires imperatively that it

Wright v. Redd Bros.

shall be both prepared and filed within time allowed for that purpose; and if filed after the expiration of that time it is as if not filed at all, and of no effect whatever. *Bettis v. State*, 103 Tenn., 339; *Muse v. State*, ante, 181; *Jones v. Moore*, ante, 188.

In the absence of a bill of exceptions the presumption is indisputable that the conclusion reached by the jury is that which the evidence required. *Scruggs v. Heiskell*, 95 Tenn., 455; *Pratt v. Gillespie*, 97 Tenn., 217; *Daniel v. Coal Co.*, 105 Tenn., 471.

Affirmed.

Railroad v. Abernathey.

106 722
117 515

RAILROAD v. ABERNATHEY.

(Jackson. April 19, 1901.)

1. SUPREME COURT. *Weight given jury's verdict.*

In passing upon an assignment that there is no evidence to support the verdict of the jury, this Court takes as true the strongest legitimate view of the testimony in favor of the successful party, and discards all countervailing testimony, because the jury, whose exclusive province it was to pass upon the credibility of witnesses, has by its verdict resolved all conflicts in his favor. (*Post*, pp. 723, 724.)

Cases cited: *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn., 119; *Railroad v. House*, 96 Tenn., 552; *Machine Co. v. Compress Co.*, 105 Tenn., 187; *Nighbert v. Hornsby*, 100 Tenn., 82; *Railroad v. Ginley*, 100 Tenn., 472.

2. SAME. *Verdict not objectionable as to amount, when.*

A verdict will not be set aside on complaint of the party against whom it was rendered, that it should, under the proof, have been for a larger amount. Such objection does not "affect the merits of the judgment." (*Post*, pp. 727, 728.)

Code construed: § 6351 (S.); § 5268 (M. V.); § 4516 (T. S.)

Cases cited: *Maddin v. Head*, 1 Lea, 664; *Pearce v. Suggs*, 85 Tenn., 724.

3. SAME. *Insufficient assignment of error.*

An assignment of error that the verdict of a jury "is contrary to the great preponderance of the evidence," presents no question that can be considered by this Court. (*Post*, p. 728.)

Cases cited: *Felton v. Clarkson*, 103 Tenn., 457; *Kirkpatrick v. Jenkins*, 96 Tenn., 85; *Cherokee v. Hilson*, 95 Tenn., 2; *Poole v. Jackson*, 93 Tenn., 62; *Railroad v. Kenley*, 92 Tenn., 208.

4. RAILROADS. *Observance of statutory precautions not excused, when.*

Unless observance of statutory precautions for prevention of accidents is impossible under the circumstances, a railroad

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company cannot be excused from such observance. (*Post*, pp. 724, 725.)

Code construed: §§ 1574, 1575 (S.); §§ 1298, 1299 (M. & V.); §§ 1166, 1167 (T. & S.).

Case cited: Railroad v. Thompson, 101 Tenn., 200.

5. SAME. *Same.*

Railroads are required to observe the statutory precautions for the prevention of accidents in running trains through its station grounds to which the fencing Act does not apply. (*Post*, p. 728.)

Case cited: Railroad v. House, 96 Tenn., 552.

FROM LAUDERDALE.

Appeal in error from Circuit Court of Lauderdale County. THO. J. FLIPPIN, J.

KIRKPATRICK & TANNER for Railroad.

THOS. STEELE and BLAIR PIERSON for Abernathey.

CALDWELL, J. The Illinois Central Railroad Co. prosecutes this appeal in error from a judgment in favor of J. M. Abernathey for \$40, as damages for the alleged wrongful killing of a cow and yearling.

In considering the first assignment of error, which is that there is no evidence to support the verdict, this Court takes as true the strongest

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Railroad v. Abernathey.

legitimate view of the testimony in favor of Abernathey, and discards all countervailing testimony, because the jury, whose exclusive province it was to pass upon the credibility of witnesses, has by its verdict resolved all conflicts in his favor. *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn., 119; *Railroad v. House*, 96 Tenn., 552; *Machine Co. v. Compress Co.*, 105 Tenn., 187; *Nighbert v. Hornsby*, 100 Tenn., 82; *Railroad v. Ginley*, 100 Tenn., 472.

In the first place Abernathey, by his own testimony and that of other witnesses, shows that he was the owner of the live stock in question, and that through passenger trains of the company going in the same direction, ran upon and killed the cow and the yearling, respectively, on different days, but near the same point within the limits of the station, at the village of Curve.

The company virtually concedes these facts, and defends the plaintiff's action alone on the alleged ground that the animals appeared upon the track so suddenly and so near the rapidly moving engines as to render the collisions with them unavoidable.

The engineer and fireman in charge of the locomotive that ran upon the cow, testify, in substance, that she was stricken at the moment of her appearance upon the track, and, hence, that no statutory precaution was or could have been observed. Upon this theory there could be no lia-

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bility for killing the cow. *Railroad v. Thompson*, 101 Tenn., 200.

But Abernathey testifies that he at once discovered continuous foot-prints, which he, for good reasons stated, believes to be those of his cow, on the track for a distance of seventy feet immediately preceding the place at which the collision occurred, and that she could easily have been seen from the pursuing locomotive at least 300 yards back of the point at which she stepped upon the track.

This testimony, rather than that of the engineer and fireman, being accredited by the verdict as it is, must be taken as true, and being true it makes a case in which the statutory precautions might and should have been observed. Their observance was possible under Abernathey's theory of the facts, and being possible it was required by the positive mandate of the statute (Shannon's Code, § 1574, Subsec. 4), and nonobservance rendered the company liable for the value of the cow. *Ib.*, § 1575.

The testimony introduced on the other branch of the case likewise shows that the yearling, if then on the railroad track, could have been seen from the locomotive for more than 300 yards back of the point at which they collided, but there is no proof of the presence of this animal's foot-prints along the track.

The engineer and fireman say the yearling ran

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on to the track very near the front of the engine, and that they had only time to cut off the steam and apply the air-brakes, which they did promptly.

No one states anything to the contrary on his own knowledge, but the plaintiff and some of his witnesses say that they heard the engineer testify on a former trial, and they understood him then to say that the appearance of the yearling upon the track was such as to render it impossible to do anything towards checking or stopping the train, and that in fact nothing was done.

These two views of the matter, that presented by the defendant on the last trial and that said to have been presented by it on the former trial, are in plain conflict; yet neither of them, considered as a whole and alone, affords any support for the conclusion of liability on the part of the defendant for the value of the yearling. That conclusion can be supported only by rejecting a part of each view, and then combining balances of both, so as to get from one the assertion that there was time to shut off steam and apply air-brakes, and from the other the assertion that nothing was in fact done.

Though somewhat novel on account of the peculiarity of the conflict, this process of elimination and combination was within the legal province of the jury, and the conclusion of liability reached thereby is a legitimate one from that

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standpoint, not subject to review and avoidance in this Court.

It is said against the amount of the verdict that it is less than the aggregate value of the two animals and more than the separate value of either of them; and, therefore, that there is no evidence to support the verdict in its amount.

The verdict is in general terms for \$40 as the plaintiff's damages *in solido*, when in fact he testified that the cow was worth \$35 and the yearling \$15, in all \$50, and no witness places a lower valuation on either animal. It is clear, then, that the verdict is less by \$10 than it should have been if the intention was to include the value of both animals; nevertheless, as that error or mistake was against the plaintiff only, it affords the defendant no legal ground of complaint.

If, on the other hand, the jury intended to return a verdict for the cow only, the amount, if \$5 more than the owner's valuation, and from that point of view, nothing else appearing, there would be an error against the defendant. In reality, however, two other witnesses say the cow was worth \$35 or \$40, and on that testimony the jury was authorized, in its discretion, to adopt the higher figures as representing her true value. This suggestion answers the objection that the verdict, if intended to fix liability for the cow alone, is excessive.

Railroad v. Abernathey.

The record, though not purporting to give the language of the verdict, indicates that it was the purpose of the jury to include in the sum returned the valuations by it placed on both animals; but, however that may have been, there is nothing in either view, as has been seen, to "affect the merits of the judgment" as against the defendant, and consequently nothing to justify a reversal. Shannon's Code, § 6351; *Maddin v. Head*, 1 Lea, 664; *Pearce v. Suggs*, 85 Tenn., 724.

The fencing statute does not apply against the company in this action, because the collisions in question occurred within the limits of the station grounds; but the statutory precautions do apply, notwithstanding the place of the collisions, because the animals were killed by through and not by switching trains. *Railroad v. House*, 96 Tenn., 552.

The second assignment of error, which is that the verdict "is contrary to the great preponderance of the evidence," presents no question that can be considered by this Court. *Felton v. Clarkson*, 103 Tenn., 457; *Kirkpatrick v. Jenkins*, 96 Tenn., 85; *Cherokee v. Hilson*, 95 Tenn., 2; *Poole v. Jackson*, 93 Tenn., 62; *Railroad v. Kenley*, 92 Tenn., 208.

Let the judgment be affirmed.

Simmons v. Taylor.

SIMMONS v. TAYLOR.

(Jackson. April 20, 1901.)

1. APPEAL. *Lies from decree on demurrer to bill, when.*

An appeal lies, in the Chancellor's discretion, by either or both parties, from a decree sustaining some and overruling other grounds of demurrer going to the entire bill, although the same decree disposes of other grounds that go to parts only of the bill. (*Post*, pp. 735-737.)

2. RECEIVER. *Power of to prosecute suits.*

The receiver of an insolvent corporation cannot by virtue merely of the order appointing him and directing him, in the usual form, "to institute all necessary or proper steps in equity or at law in assertion of the rights vested in him as receiver," bring and maintain suits for the recovery of the extraordinary or conditional assets of the company, such as unpaid stock subscriptions, and damages for negligence, malfeasance, and mismanagement of the corporate affairs by the corporate officers, but for this purpose he must obtain and aver the special order and direction of the Court appointing him. (*Post*, pp. 737-740.)

Case cited: *Conley v. Deere*, 11 Lea, 274.

3. SAME. *Same.*

The receiver of an insolvent corporation cannot maintain suit upon the statutory liability of directors who have assented to the creation of debts in excess of the capital stock of the company. This liability is not an asset of the corporation, but inures directly and exclusively to the benefit of the particular creditors thereby affected. (*Post*, pp. 737-740.)

Cases cited: *Tradesman's Pub. Co. v. Car Wheel Co.*, 95 Tenn., 634; *Moulton v. Connell-Hall Co.*, 93 Tenn., 377.

4. SAME. *Must aver authority to sue.*

A receiver must aver proper and sufficient authority from the Court appointing him to bring his suit, or the same will be dismissed on demurrer. (*Post*, pp. 737-740.)

Case cited: *Conley v. Deere*, 11 Lea, 274.

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5. SUPREME COURT. *Papers are not parts of record, when.*

Papers attached to the transcript of the record of a chancery cause do not constitute part of the record unless they are therein referred to and identified as such. (*Post*, pp. 738, 739.)

Case cited: *Russell v. Bank*, 104 Tenn., 618.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKEIL, Ch.

PERKINS & WATSON for Simmons.

SMITH & TREZEVANT and T. K. RIDDICK for Taylor.

WILKES, J. This is a bill by the receiver of an insolvent domestic manufacturing corporation to enforce certain stock subscription liabilities and to recover from the officers and directors for negligence, malfeasance and mismanagemet of the corporate affairs, and for allowing debts to be incurred by the corporation beyond the amount of capital stock paid in.

The original bill was filed March 12th, 1896, against Taylor, Wellford and Ward, and alleged generally the chartering and inception of the corporation in 1887, and the election of officers under the corporate name of the Wellford Manufacturing Company; that in 1890 a new charter was obtained under the corporate name of the Mem-

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phis Barrel and Heading Company, and that it organized on January 22d, 1891, by the election of officers. The capital stock was fixed at \$100,000, and of this \$25,000 was issued to the Wellford Manufacturing Company in payment of its plant, and \$12,500 to John F. Wheless and Matt F. Allen for a patent right to be used in the business. No other amounts were paid in and no other stock appears to have been issued.

It is charged that the patent right did not exceed \$500 in value; that the plant and property of the Wellford Manufacturing Company did not exceed \$4,000 in value; that Allen and Wheless transferred their stock to Taylor, Ward, Williamson and Wellford, and it is charged that they are in equity liable to pay the amount of this subscription of stock, inasmuch as the alleged payment was inadequate and the parties all knew the fact and were liable for the difference between the stock subscribed and the actual value received by the company.

The bill further averred that complainant was receiver of the Memphis Barrel and Heading Company, by appointment of the same Court, in a cause filed in that Court against A. K. Ward to wind up the corporation, and a copy of the decree of appointment and authority vested in him as receiver is made exhibit A to the bill and prayed to be made part thereof, but not to be copied.

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The bill further alleges that subsequently an order was entered in that cause empowering, authorizing and directing complainant, as receiver, to institute all necessary or proper steps in equity or at law in assertion of the rights vested in him as receiver, and this order is referred to as exhibit B, and prayed to be made part of the bill.

There are papers, which in the main answer the description of these exhibits, attached to the record after the final decree and prayer and granting of appeal, but they are not made part of the record nor identified as exhibits A and B by any marks or references.

A copy of a petition and an order thereon, filed in the case of the *Memphis Barrel and Heading Company v. Ward*, the same case in which complainant was appointed receiver, and in which the order above mentioned was entered, is also attached at the close of the present transcript, from which it appears that the property of the corporation had been levied upon under execution against Ward, and authority was given to replevy the same and to institute actions at law and suits in equity on all such necessary and proper occasions and under such circumstances as aforesaid, also another copy of a different petition and order thereon is likewise attached to the transcript in the same manner, reciting that the Supreme Court of the State had held that

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the previous order of the Court did not confer upon the receiver the rights to institute suits or actions for the collection of unpaid subscriptions or the collection of equitable assets. And upon this petition the Court authorized, directed and empowered the receiver to collect all debts due the company, to assert his right to all of its property, to collect unpaid subscriptions to the capital stock, to avoid all fraudulent transfers by the company, its officers or directors, and to impeach or avoid all issues of stock actually or constructively fraudulent, and to institute all actions or suits at law or in equity for the collection of all assets of the corporation, whether legal or equitable. Neither of the latter two orders are in any way made part of the record or referred to in it in any way, and they are only part of the transcript by being attached to it as heretofore stated.

A demurrer was filed to the original bill April 14, 1896. The grounds stated, among others, were that there was no allegation of any creditors of the company or any claims allowed against it, that it was not alleged that the tangible assets had been exhausted, and that no proper order authorizing the suit is shown.

This demurrer was not acted upon, but October 30, 1899, leave was granted to file an amended bill, which was actually filed December 9, 1899.

The amended bill charged that Wellford had

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died insolvent, Williamson had also died, and their representatives were not made parties. The same charges are made as in the original bill, but more in detail, and liability is sought to be imposed on the same grounds as in the original bill, to wit: subscriptions unpaid, negligence, non-feasance and misfeasance in performance of duties, assenting to debts in excess of the capital stock paid in, etc.

The bill alleges that debts to a large amount, some \$239,000, had been established in the original suit, but no particular debt or creditor is named, no creditor is made a party, and the bill does not allege that it is brought in behalf of creditors or show that fact, except so far as may be inferred from the statement that it is brought in discharge of the duties of complainant as receiver.

On February 5, 1900, Defendant Taylor, who seems to be now the sole litigant, the other parties having died or become insolvent and the suit being against Taylor alone, moved, to strike the amended bill from the files because no cost bond had been given and the demurrer to the original bill was pending and undisposed of when the amended bill was filed. The Chancellor required a cost bond, which was given, and he overruled the motion to strike from the files. Defendant Taylor then filed a demurrer to the amended bill, embracing eighteen grounds. The first is that there

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was no order of the Court appointing the receiver authorizing the filing of the original bill, and as it had no standing in Court it could not be amended.

Second, that there was no proper order of the Court for filing the amended bill. The other grounds presented were generally that the liabilities alleged were such as could be enforced by creditors alone, and the bill was not filed by creditors nor expressly on their behalf, does not name any or allege that it is brought at the request of any.

The demurrers to the original and amended bills were heard together.

The demurrer to the original bill was sustained and that bill dismissed. The demurrer to that part of the amended bill which sought to recover from defendant on the ground of negligence was sustained, as was that charging liability for debts created beyond the capital stock, and also that setting up the statute of limitations of six years, also that charging liability for Ward's negligence and for defendant's own carelessness.

All other grounds of demurrer were overruled and appeals were taken by both parties, and errors have been assigned.

The first question presented is whether the appeals are not premature.

Treating the original and amended bills as forming but parts of one entire pleading, it appears

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that demurrers to parts of the bill have been sustained and to other parts overruled, so that apparently the case is not disposed of in the Court below.

If we treat them separately the same result appears. But we think this result is more apparent than real. There is a ground of demurrer to the original bill and a like ground to the amended bill, which goes to the entire bill in each case and questions it upon a point which extends to it as a whole, and that is the right of the receiver to sue for the causes of action alleged in his bill without the special order of the Court appointing him. This right is denied by the Chancellor as it is presented in the original bill, and if there were nothing else in the record, the complainant, having his bill dismissed, would have an appeal as a matter of right. But it is not refused by the Chancellor in his action on the amended bill, and the demurrer of the defendant upon this ground is overruled.

From the overruling of this demurrer an appeal at the instance of defendant lies within the discretion of the Chancellor, and such appeal has been granted by him, so that we think the case is before us on appeal of each party from a ruling adverse to each, which goes to the entire right to maintain the suit. That there are also rulings which go to special features of the case and upon which the decision of the Court be-

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low was in some instances in favor of complainant and in some other features favorable to defendants cannot matter, as these features cannot be considered if the complainant has not the right to maintain the suit for want of proper authority from the Court which appointed him.

We proceed, therefore, to consider the correctness of the Court's ruling upon complainant's right to maintain the suit. We are of opinion the Court erred in overruling the first and second grounds of demurrer to the amended bill. As before stated, these grounds go to the original as well as the amended bill, and question the authority of the receiver to file the bill without the instructions of the Court appointing him. A receiver in filing a bill, especially when he is prosecuting a suit for equitable assets or statutory liabilities involving questions of difficulty and litigation, should show upon the face of his bill authority for filing it from the Court which appointed him.

He should show that by order or decree of the Court appointing him authority has been conferred upon him in his representative capacity as receiver to prosecute such action. High on Receivers, Secs. 201, 202, 208; Smith on Receivers, Secs. 71, 391, 2, 3.

In Smith on Receivers, cited *supra*, it is said: "It is necessary that a receiver, before bringing suit, obtain leave of Court authorizing suit either

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general or special. If the nature of the case is such as to require it, it may be expedient to give a receiver such general power in the order of appointment, and thus avoid the necessity of several applications therefor. If, however, the suit is likely to be protracted and expensive, special leave should be asked and obtained. A receiver, simply being an officer of Court, his own protection requires that his action in regard to litigation should have the sanction of the Court. He must show in his complaint leave of the Court to sue." *Conley v. Deere*, 11 Lea, 274; *Rodes v. Hilligoss*, 45 N. E. Rep., 666.

Complainant does not show in his bill any sufficient or valid authority from the Court which appointed him for bringing this suit—that is, no order of the Court appointing him which empowers him to bring the present suit or one for the purposes and objects of the present suit. Strictly speaking, it shows no authority except such as the law imposes upon a receiver without an order of the Court. The two papers which were probably intended as exhibits A and B are not really made part of the record, and if they were and treated as properly in it, they confer only general power to collect debts, recover specific property and take charge of the assets of the corporation. The other petitions and orders thereon are not made part of the record, not re-

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ferred to in it and are improperly in the transcript. *Russell v. The Bank*, 20 Pick., 618.

The complainant in the present case is seeking extraordinary relief and prosecuting remedies which are not within the ordinary purview of a receivership.

The authority vested in a receiver as a matter of law and solely by virtue of his appointment or under a general order such as is contained in exhibits A and B, is not to bring any sort of a suit which he may deem best or advisable, but only such necessary and proper suits as are required to assert the rights vested in him as receiver. The assets of a corporation, in the broadest sense, may be divided into two classes:

1. Primary assets, that is, property belonging to the corporation and standing in its name.
2. Conditional assets, such as a stockholder's liability for unpaid subscriptions or dividends unlawfully paid.

There are under the National Banking Act also statutory assets, such as the liability of stockholders to assessments. The right of the receiver to the first class of assets vests in him as soon as he is appointed and his rights and duties declared in general terms.

The second class do not vest in him until the Court has ascertained and decreed that it is necessary to resort thereto in order to pay the debts of the corporation. There is another class of

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assets which do not vest in a receiver at all, but arise out of statutory provisions in favor of creditors of a certain kind; that is the liability of directors assenting to the creation of debts in excess of the capital stock of the corporation. This right only vests in excess creditors and not in the corporation itself, and can be sued for only by such creditors. *Tradesman's Pub. Co. v. Car Wheel Co.*, 11 Pick., 634; *Moulton v. Connell Hall Co.*, 9 Pick., 377; 17 Enc. Pl. and Prac., 816, note.

Unpaid balances on subscriptions cannot be collected unless there is a necessity therefor to pay debts, or in equalizing stockholders in the distribution of the assets on winding up the corporation.

Before unpaid subscriptions are collected certain conditions must appear—that is, that the other assets have been or are being collected and are insufficient to pay the debts.

An account must be taken and an order made in the nature of a call upon stockholders for unpaid subscriptions and this must be made ratably so as to be equal and uniform. Thompson on Corporations, Secs. 3386, 3387, 3537, 3538, 6962; Smith on Receivers, pp. 175, 404; *Chandler v. Ruth*, 42 Iowa, 99; *Scoville v. Thayer*, 105 U. S., 143.

We are of opinion that in order to maintain an action for the causes mentioned in this bill the

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receiver should have had the order and direction of the Court appointing him and having control of him, and such order and direction should have been specific in its direction as to the nature and character of the suit to be brought.

Without considering in detail the other assignments and questions raised, we are of opinion the complainant was not authorized to bring the suit by the Court in the case in which he was appointed. That both suits happened to be in the same Court does not alter the case, and the original and amended bill should have been dismissed for want of authority to bring them.

The judgment of the Court below is modified and the bill dismissed at complainant's cost.

ERRATA.

On page 559, read "saved" for "sold" in next to last line of headnote No. 5.

On page 623, read "status" for "statutes" in catchword to ninth headnote.

On page 689, read "Art. X., § 4," for "Art. IV., § 10," under second headnote.

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